(27,438)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 683.

GEORGE WALLACE, OBERT A. OLSEN, CARL R. KOSITZKY, ET AL., APPELLANTS,

vs.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS; NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Exhibits A, B, C, D, E, and F (omitted in printing by stipulation)	35	
Motion for restraining order	102	21
Record of proceedings	103	23
Notice of hearing application for restraining order	123	33
Order for injunction	125	34
Bond for injunction	126	35
Injunction	128	36
Petition for appeal and allowance	129	37
Præcipe for record	129	37
Citation and service	130	38
Clerk's certificate	132	40
Stipulation to omit exhibits to bill of complaint in printing record	133	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1920.

1 In the District Court of the United States for the District of North Dakota, Southeastern Division.

WALKER D. HINES, Director General of Railroads; NORTHERN PACIFIC Railway Company, Great Northern Railway Company, Chicago, Milwaukee and St. Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, Montana Eastern Railway Company, and Farmers' Grain and Shipping Company, Complainants,

vs.

GEORGE WALLACE, OBERT A. OLSON, CARL H. KOSITSKY, WILLIAM LANGER, and THOMAS HALL, Defendants.

Pleas Before the Honorable Charles F. Amidon, United States District Judge for the District of North Dakota.

Be it remembered that on the 28th day of November, A. D. 1919, a bill of complaint was filed in this case, which bill of complaint with exhibits attached are in words and figures following, to-wit:

2 To the Honorable the Judges of the District Court of the United States for the District of North Dakota:

Walker D. Hines, Director General of Railroads, a citizen and resident of the State of New York, Northern Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, Chicago, Milwaukee & St. Paul Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a consolidated corporation created and existing under and by virtue of the laws of the States of Michigan, Wisconsin, Minnesota and North Dakota, Montana Eastern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Montana, and Farmers'
3 Grain & Shipping Company, a corporation created and existing under and by virtue of the laws of the State of North Dakota, brings this their bill of complaint against George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, citizens of the State of North Dakota, and residents within the said District, and thereupon complain and allege:

I.

By proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolution of the Senate and House of Representatives bearing date April 6, and December 7, 1917, respectively, and particularly under the powers conferred by Section

1 of the Act of Congress approved August 29, 1916, and entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at twelve o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Montana Eastern Railway Company, and Farmers' Grain and Shipping Company, and the appurtenances thereof, and directed the possession, control, operation and utilization of the transportation systems thus taken should be exercised by and through W. G. McAdoo, appointed Director General of Railroads.

4 II.

The Congress of the United States, by an Act approved March 21, 1918, authorized the President to enter into agreements with the companies owning the railroads and systems taken over, for the maintenance and upkeep of the same during the period of Federal control, for a determination of the rights and obligations of the parties to such agreements arising from or out of Federal control; and the President, by proclamation dated March 29, 1918, acting under said Act approved March 21, 1918, and by other powers him thereto enabling, authorized the Director General, either personally, or through such divisions, agencies or persons as he might appoint, and in his own name or in the name of such divisions, agencies or persons, or in the name of the President, to agree with the companies, or any of them, owning such railroads and transportation systems, and to make any and all contracts, agreements or obligations necessary or expedient in connection with Federal control of systems of transportation, as fully in all respects as the President is authorized to do.

III.

Thereafter, W. G. McAdoo, Director General of Railroads, by virtue of the power and authority conferred on him as aforesaid, did enter into certain agreements in writing with the aforesaid companies (except Farmers' Grain & Shipping Company) concerning the Director General's possession and control of the railroads and transportation systems of the aforesaid companies, wherein and whereby it is provided in each of said agreements that the

5 Director General shall either pay, out of the revenues derived from railway operation during the period of Federal control, or shall save the company harmless from, all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Interstate Commerce Commission, in force December 31, 1917, are properly chargeable to "railway tax accruals;" that said agreements and each of them are now in full force and effect.

IV.

Thereafter, said W. G. McAdoo, having resigned as Director General of Railroads and the plaintiff, Walker D. Hines, having been duly appointed by the President to succeed the said W. G. McAdoo, the plaintiff, Walker D. Hines, did succeed to and is now in possession of all the powers and authority formerly exercised and enjoyed by the said W. G. McAdoo, Director General of Railroads.

V.

The Northern Pacific Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Duluth, Minnesota, Superior, Wisconsin and Saint Paul, Minnesota, and extending westerly from said termini through the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon and British Columbia to Puget Sound and Pacific Coast ports;

The Great Northern Railroad is a transportation system consisting of railway lines and branches having their eastern termini
6 at Duluth, Minnesota, Superior, Wisconsin, and Saint Paul, Minnesota, extending westerly from said termini through the States of Minnesota, Iowa, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon and British Columbia to Puget Sound and Pacific Coast ports;

The Chicago, Milwaukee and Saint Paul Railroad is a transportation system consisting of railway lines and branches, having their eastern terminus at Chicago, Illinois, and extending northerly, northwesterly and westerly through the States of Illinois, Michigan, Wisconsin, Iowa, Missouri, Minnesota, Nebraska, South Dakota, North Dakota, Montana, Idaho and Washington to Puget Sound and Pacific Coast ports;

The Minneapolis, Saint Paul and Sault Sainte Marie Railroad is a transportation system consisting of railway lines and branches having their eastern termini at Sault Sainte Marie, Michigan, and Chicago, Illinois, and extending westerly from said termini through the States of Wisconsin, Minnesota, North and South Dakota, and into the State of Montana;

The Farmers' Grain and Shipping Railroad is a transportation system consisting of a railway line having its southern terminus at Devils Lake, North Dakota, and extending northerly through the State of North Dakota to Rock Lake, North Dakota;

The Montana Eastern Railroad is a transportation system consisting of a railway line extending from Snowdon, Montana, to Richley, Montana, with a branch line running from Fairview, on or near the boundary line between the States of Montana and North Dakota, easterly to Watford City, North Dakota.

The said corporate plaintiffs were all chartered as railroad companies, and their railways, now, and during the calendar year 1918, in control of the said Director General of Railroads and operated

by him, have been devoted to the transportation of passen-
7 gers and goods, both state and interstate, and have been and now are instrumentalities of interstate commerce. Said corporate plaintiffs before the year 1918 duly complied with all the laws of North Dakota imposing requirements with respect to the doing of business, owning of property, and suing and being sued in that state, and before the year 1918 were, and have since continued to be, duly licensed and privileged to carry on business within that state authorized by their charters and the laws thereof.

VI.

The defendants are officers of the State of North Dakota, duly qualified and acting as such; George Wallace is the State Tax Commissioner, Obert A. Olson is the State Treasurer, Carl R. Kositzky is the State Auditor, William Langer is the Attorney General, and Thomas Hall is the Secretary of State.

VII.

This is a suit in equity between the plaintiffs and the defendants; arises under the Constitution and laws of the United States, as hereinafter more particularly will appear; involves, exclusive of interest and costs, over ten thousand dollars; is brought to enjoin the collection of certain taxes assessed and levied against the corporate plaintiffs under that Act of the Legislature of North Dakota known as House Bill No. 47, approved March 7, 1919, imposing "a special excise tax with respect to the carrying on or doing business in the state," which tax the plaintiffs allege has been assessed and levied contrary to, and in violation of, Section 1 of the Fourteenth Amendment to the Constitution of the United States, and contrary to, and in violation of, Section 8, Article I of the Constitution of the United States.

8 VIII.

Paragraph (2) of Section 1 of said House Bill No. 47, defining the basis of tax against corporations, joint-stock companies or associations organized under the laws of other states or countries than North Dakota, provides:

"Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each $1000.00 of the capital actually invested in the transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within

the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation."

9 IX.

Before said House Bill No. 47 was passed, all property and franchises of the corporate plaintiffs in North Dakota were taxed under other statutes of the state on the basis of their supposed full value, the said valuation for the year 1917 having been about $97,000,000.00 for the Northern Pacific Railway Company, about $113,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway, about $17,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, about $52,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and about $1,324,000.00 for the Farmers' Grain & Shipping Company; and for the year 1918 about $90,000,000.00 for the Northern Pacific Railway Company, about $104,000,000.00 for the Great Northern Railway Company, including the Montana Eastern Railway, about $16,000,000.00 for the Chicago, Milwaukee & St. Paul Railway Company, about $48,000,000.00 for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and about $1,229,000.00 for the Farmers' Grain & Shipping Company. These valuations for both the years 1917 and 1918 are now in litigation in this court, in the cases of Northern Pacific Railway Company v. Charles W. Nelson and others, Great Northern Railway Company v. F. A. Burton and others, Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. F. A. Burton and others, and Farmers' Grain & Shipping Company v. J. A. Kramer and others, for 1917, and Walker D. Hines v. H. J. Sticken and others, for 1918, the plaintiffs contending in said litigations that the total taxable value of their franchises and rail-
10 road property in North Dakota were not in either year in excess,—those of the Northern Pacific of $81,000,000.00, those

of the Great Northern of $94,000,000.00, including the Montana Eastern, and those of the Minneapolis, St. Paul & Sault Ste. Marie of $42,500,000.00.

X.

The defendant, George Wallace, having demanded of each of the corporate plaintiffs a return for taxation in compliance with the provisions of House Bill No. 47, each of said corporate plaintiffs filed, on or about the 30th day of July, 1919, in due form, their returns with the Tax Commissioner, copies of which are hereto annexed and made a part of this bill and marked exhibits "A", "B", "C", "D", "E" and "F".

The said House Bill No. 47 was adopted from and modeled upon the Acts of Congress imposing an excise tax on corporations with respect to carrying on or doing business. The Acts of Congress had been construed before said House Bill No. 47 was passed, as not imposing a tax upon corporations which had ceased to carry on the corporate functions for which they were incorporated, and specifically as not imposing a tax on railroad companies which had leased their railroads or otherwise had ceased to operate them. Since House Bill No. 47 was passed the similar Act of Congress now in force has been construed as not imposing a tax on the corporate plaintiffs or on other corporations similarly situated whose property had been taken over by the President in manner before stated.

XI.

11 The defendant, George Wallace, as State Tax Commissioner, assessed against the Northern Pacific Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1918 of $55,015.10, and on or about October 23, 1919, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 6th day of November, 1919, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Great Northern Railway company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1918 of $49,658.91, and on or about October 23, 1919, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 3rd day of November, 1919, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Chicago, Milwaukee & St. Paul Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1918 of $8,119.68, and on or about October 23, 1919, the defendant,

Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 6th day of November, 1919, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Minneapolis, St. Paul & Sault
12 Ste. Marie Railway Company under the pretended authority of House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1918 of $25,635.39 and on or about October 23, 1919, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 6th day of November, 1919, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Montana Eastern Railway Company under the pretended authority of said House Bill No. 47, notwithstanding said company's return as aforesaid, a tax for the fiscal year 1918 of $223.70, and on or about October 23, 1919, the defendant Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 3rd day of November, 1919, and demanded payment thereof.

The defendant, George Wallace, as State Tax Commissioner, assessed against the Farmers' Grain & Shipping Company, under the pretended authority of said House Bill No. 47, notwithstanding said company's return aforesaid, a tax for the fiscal year 1918 of $187.08, and on or about October 23, 1919, the defendant, Carl R. Kositzky, as State Auditor, drew his draft on the said company and delivered the same to the defendant Obert A. Olson, State Treasurer, who transmitted the same to said company on or about the 3rd day of November, 1919, and demanded payment thereof.

13 XII.

The special facts as to the assessment against the Northern Pacific Railway Company are alleged to be as below stated in paragraphs (*a*) to (*e*), and the word "plaintiff" wherever used in these paragraphs means Northern Pacific Railway Company:

(*a*) The said assessment was arrived at in this manner: the defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $476,983,969.00; determined the ratio of its North Dakota business to the total business of the plaintiff to be 23.07 per cent, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $110,040,201.00; deducting legal exemption of $10,000.00 the fifty cents per $1,000.00 tax was laid on the balance, $110,030,201.00. The ratio of 23.07 per cent was the ratio of plaintiff's operated main track mileage in the State of North Dakota to its total operated main track mileage. This operated main track

mileage was materially different from the main track mileage owned by the plaintiff, and counted miles of track, main line, branch line, single track, second track, third track, or fourth track, excluding passing tracks, side tracks, industry tracks, and tracks in yards and terminals; took no account of the cost or value of any track, counting light and cheap single track branch line as equivalent to the heaviest and most expensive track. Over 75 per cent of plaintiff's operated mileage in North Dakota was branch line. The computation ignored the cost or value of plaintiff's large amount of track in mountainous regions, where construction is extremely expensive, and left out of consideration its expensive terminals and yard tracks and property, notwithstanding North Dakota is a state of plains and prairies with no mountains, and a state which contains no large yards or terminals. There is no uniformity in the cost or value of plaintiff's railway in North Dakota as compared with the cost or value of its railway in other states. The physical conditions in North Dakota are materially different from those in any of the said other states. In respect of yards and terminals, North Dakota contains no large terminal
14 and not to exceed four per cent in cost or value of those on the whole system, which includes terminals of great expense and unusual value in Superior, Wisconsin, Duluth, St. Paul, Minneapolis in Minnesota, Spokane, Tacoma and Seattle in Washington, Portland in Oregon, Butte in Montana, and many minor points. The aggregate amount of all track, main and other track of plaintiff in North Dakota is 1.26 miles of track per operated mile of road, while for the system it is 1.44 miles of track per operated mile of road.

(*b*) The said main track mileage apportionment ignored the fact that the plaintiff in the year 1918 owned lands granted by Congress to aid in the construction of its railroad of indeterminate value which were worth many millions of dollars and which were situated in Minnesota, Montana, Washington, and states other than North Dakota, with the exception of a negligible acreage and value in North Dakota. The estimated value of these land grants, including plaintiff's outstanding land contracts arising therefrom, exceeded $35,000,000.00; besides which plaintiff was the owner of iron and other lands in Minnesota contained in grants made by Congress to the Lake Superior & Mississippi Railroad Company and to the Taylors Falls and Lake Superior Railroad Company which were of an estimated value of $16,000,000.00; besides which the plaintiff in the same year owned stocks, bonds, notes and advances to affiliated companies valued on plaintiff's books at over $171,000,000.00, and other investments consisting of bonds valued on plaintiff's books at over $7,723,000.00, and it owned current and deferred assets, consisting of cash and claims for cash of substantial and large value. No part of the said stocks, bonds and other personal assets were situated in North Dakota or grew out of business of the plaintiff done in that state.

(*c*) The said assessment included the following bonds of the plaintiff or assumed by it, none of which were liens on property in North Dakota or represented any investment or property within that state, viz.: Northern Pacific Railway St. Paul-Duluth Division bonds valued at $6,504,400.00, which were liens against property in Minnesota

and Wisconsin only; St. Paul & Northern Pacific Railway
15 Company General Mortgage bonds assumed by plaintiff, valued at $8,074,894.00, which were liens against property in Minnesota only; St. Paul & Duluth Railway First Mortgage bonds assumed by plaintiff, valued at $980,000.00, which were liens against property in Minnesota and Wisconsin only; St. Paul & Duluth Railway Consolidated Mortgage bonds, valued at $762,500.00, which were liens against property in Minnesota and Wisconsin only; Washington & Columbia River Railway First Mortgage bonds assumed by plaintiff, valued at $112,000.00, which were liens against property in the State of Washington only; plaintiff's one-half liability on Northern Pacific and Great Northern Joint Collateral Trust bonds valued at $101,557,087.00, which were liens on certain shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company only, that company having no property in North Dakota.

(*d*) Whilst the plaintiff was not operating during the taxable year its railway or railway property, the operation thereof by the Director General of Railroads realized during the taxable year a total railway operating revenue from local business in North Dakota of $2,589,102.84, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $14,124,687.92, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was in the same year $102,908,259.47.

(*e*) Whilst the said Tax Commissioner apportioned to North Dakota, as above shown, 23.07 per cent of the alleged total value of its stocks and bonds, various features of the railway operations carried on by the Director General by means of plaintiff's railways show: the train miles in North Dakota were 17.7 per cent of the total train miles; the locomotive miles were 15.3 per cent of the total locomotive miles; the freight train car miles were 16.9 per cent of the total freight train car miles; all car miles were 16.95 per cent of all car miles; gross operating revenue (including proportion of interstate revenue as above stated) was 16.25 per cent of the total gross operating revenue; the net operating revenue was 18.2 per cent of the total net operating revenue.

The said assessment determines plaintiff's invested capital
16 in North Dakota to be $110,040,201.00. As hereinbefore shown plaintiff has alleged and is contending in the litigation over its property tax in the state, that the value of its property in North Dakota does not exceed $81,000,000.00.

Over ten years ago, the plaintiff established a department or bureau of railway valuation for the purpose of making a careful inventory of all its property and determining the value of the same. It has carried this work on in a large way ever since; has expended the best effort within its power and several hundred thousand dollars to deter-

mine said valuation. It has now proceeded so far as to be certain that a fair estimate of the cost of reproducing its property in North Dakota new without depreciation does not exceed $81,000,000.00. What the Interstate Commerce Commission will ultimately determine to be the value of plaintiff's property in North Dakota cannot be determined. But the Commission has already ruled that a substantial reduction from the estimated cost of reproduction new must be made for depreciation. The plaintiff has ascertained and determined tentative values for its whole system as well as for the State of North Dakota, and has determined values of all parts of the system according to the same rules and principles. So that without reference to whether its determinations are correct, the North Dakota proportion of the aggregate for the system is determinable with substantial correctness from its said valuation work. This proportion is for North Dakota 14 per cent of the total.

XIII.

The special facts as to assessment against the Great Northern Railway Company are alleged to be as below stated in paragraphs (*a*) to (*e*), inclusive, and the word "plaintiff" wherever used in these paragraphs means Great Northern Railway Company:

(*a*) The said assessment was arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year
17 1918 to be $377,672,369.00; determined the ratio of its North Dakota business to the total business of the plaintiff to be 26.30 per cent, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $99,327,833.00; deducting legal exemption of $10,000.00 the fifty cents per $1,000.00 tax was laid on the balance, $99,317,833.00. The ratio of 26.30 per cent was the ratio of plaintiff's owned and operated track mileage in the State of North Dakota to its total owned and operated track mileage in the United States of America. This ratio treated all trackage miles owned by the plaintiff as being of substantially equal value and was based on the assumption that the average trackage miles in North Dakota was of substantially the same value as the average trackage miles on the plaintiff's entire system. It was based upon main and branch line single track mileage and took no note of second, third or fourth tracks, passing tracks, side tracks, industry tracks and tracks in yards and terminals; it took no account of the cost or value of any track, counting light and cheap single track branch lines as equivalent to the heaviest and most expensive track. The computation ignored the cost or value of plaintiff's large amount of track in mountainous regions, where construction is extremely expensive and left out of consideration the plaintiff's expensive terminals and yard tracks and property, notwithstanding North Dakota is a state of plains and prairies with no mountains, and a state in which the plaintiff has no large yards or terminals. There is no uniformity in the cost or value of plaintiff's railway in North Dakota as compared with the cost of value of its railway in other states. The physical conditions

in North Dakota are materially different from those in any of the said other states. The plaintiff has no yards and terminals in North Dakota comparable as to cost and value with its yards and terminals in other states. The plaintiff has very extensive yards and terminals in the States of Wisconsin, Minnesota, Washington and British Columbia, costing unusually large amounts and of unusual value, and which when taken in connection with the plaintiff's railway lines in said states makes the average value per mile in said states far greater than the average value per mile in the State of North Dakota.

18 (*b*) The said owned and operated track mileage apportionment ignored the fact that in the year 1918 the plaintiff owned stocks, bonds and notes of and advances to affiliated companies valued on the plaintiff's books at approximately $230,000,000.00, and owned other investments consisting of bonds, notes and stock, valued on the plaintiff's books at substantially $8,000,000.00, and in addition it owned current and deferred assets, including cash and claims for cash amounting to several million. No part of said stocks, bonds and other personal assets was situated in North Dakota or grew out of business of the plaintiff done in that state.

(*c*) In determining the fair average value of the capital stock and bonds of the plaintiff for the purpose of the assessment of the tax, the defendant Wallace included the following bonds of the plaintiff or assumed by it, none of which were liens on property in North Dakota or represented any investment or property within that state, namely: St. Paul, Minneapolis & Manitoba Railway Company, Montana Extension four per cent bonds assumed by plaintiff, valued at $21,687,000.00, which were liens against property in Montana only; St. Paul, Minneapolis & Manitoba Railway Company Pacific Extension bonds, assumed by plaintiff, valued at $29,090,909.09, which were liens against property in the States of Montana and Idaho; Eastern Railway Company of Minnesota, Northern Division First Mortgage four per cent bonds, assumed by plaintiff, valued at $9,700,000.00, which were liens against property in Minnesota only; Montana Central Railway Company First Mortgage bonds, valued at $10,000,000.00, assumed by plaintiff, which were liens against property in Montana only; Willmar & Sioux Falls Railway Company First Mortgage bonds, assumed by plaintiff, valued at $3,646,000.00, which were liens against property in Minnesota, South Dakota and Iowa only; Minneapolis Union Railway Company First Mortgage bonds, assumed by plaintiff, valued at $2,800,000.00, which were liens against property in Minnesota only; Spokane Falls & Northern Railway Company First Mortgage bonds valued at $2,812,000.00, assumed by plaintiff, and were liens against property in Washington only; plaintiff's one-half liability on Northern Pacific and Great Northern Joint Collateral Trust bonds valued at $101,557,087.50, which were liens on certain shares of the capital stock of the Chicago, Burlington & Quincy Railroad Company only, that company having no property in North Dakota.

19 (*d*) Whilst the plaintiff was not operating during the taxable year its railway or railway property, the operation

thereof by the Director General of Railroads realized during the taxable year a total railway operating revenue from local business in North Dakota of $2,487,498.20 (including the Montana Eastern) and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $14,767,973.26, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was in the same year $100,651,065.74 (including the earnings from subsidiary companies in Canada, the entire capital stock of which is owned by the plaintiff.)

(e) Whilst the said Tax Commissioner apportioned to North Dakota, as above shown, 26.30 per cent of the alleged total value of its stocks and bonds, various features of the railway operations carried on by the Director General by means of plaintiff's railway show; the train miles in North Dakota were 19.45 per cent of the total train miles; the locomotive miles in North Dakota were 16.90 per cent of the total locomotive miles; the freight train miles in North Dakota were 18.53 per cent of the total freight train miles; all car miles in North Dakota were 17.75 per cent of all car miles; gross operating revenue in North Dakota (including proportion of interstate revenue as above stated) was 17.14 per cent of the total gross operating revenue.

For the past five years the plaintiff has been actively engaged in conjunction with the Bureau of Valuation of the Interstate Commerce Commission of the United States, in valuing the plaintiff's railway properties under and pursuant to Act of Congress approved March 1, 1913, entitled "An Act to Amend an Act" entitled "An Act to Regulate Commerce" approved February 4, 1887, etc.; that while the valuation of the plaintiff's railway properties has not been wholly completed by the plaintiff and Interstate Commerce Commission, it has progressed to the extent that the plaintiff has (1) completely estimated, and compiled the figures showing, the cost of reproducing new the plaintiff's railway properties in the State of North Dakota, which cost of reproducing new, as of April 1, 1918, is about $94,000,000.00, and (2) compiled the cost of said railway properties to the plaintiff, which cost, as of April 1, 1918, is about $63,000,000.00.

The Montana Eastern Railway Company has never operated its railway properties. To date its sole activities have been that of the creation of its railway properties. When any of its railway lines were ready for operation the same were turned over to the Great Northern Railway Company for operation and said lines have been operated by the Great Northern as a part of its system.

The amount of business located in North Dakota (as heretofore stated) done by the Director General on the Great Northern lines, includes local business done on the lines of the Montana Eastern Railway Company.

XIV.

The special facts as to the assessment against the Chicago, Milwaukee & St. Paul Railway Company are alleged to be as below stated in paragraphs (*a*) to (*e*), and the word "plaintiff" wherever used in these paragraphs means Chicago, Milwaukee & St. Paul Railway Company:

(*a*) The said assessment was arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $441,558,988.04; determined the ratio of its North Dakota business to the total business of the plaintiff to be 3.68 per cent, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital investment to be $16,249,370.00; deducting legal exemption of $10,000.00 the fifty cents per $1,000.00 tax was laid on the balance, $16,239,370.00. The ratio of 3.68 per cent
21 was the ratio of plaintiff's operated road mileage in the State of North Dakota to its total operated road mileage. This rule took no account of the cost or value of any track, counting light and cheap single track branch line as equivalent to the heaviest and most expensive track. Over 75 per cent of its operated mileage in North Dakota was branch line. The computation ignored the cost or value of its large amount of track in mountainous regions, where construction is extremely expensive, and left out of consideration its expensive terminals, yard tracks and property, notwithstanding North Dakota is a state of plains and prairies with no mountains, and contains no large yards or terminals. There is no uniformity in the cost or value of its railway in North Dakota as compared with the cost or value of its railway in other states. The physical conditions in North Dakota are materially different from those in any of the said other states. In respect of yards and terminals North Dakota contains less than five per cent of cost or value, as its system includes terminals of great expense and unusual value in Chicago, Milwaukee, Minneapolis, Kansas City, Marion, Iowa, Butte, Montana, Spokane, Tacoma and Seattle in Washington, and other minor points. On its railroad in North Dakota there are no long or expensive bridges over large rivers, like those over the Missouri and the Mississippi in other states, and there are no tunnels in North Dakota as in Montana, Idaho and Washington. The aggregate amount of all track, main and other track of plaintiff in North Dakota is 1.13 miles of track per operated mile of road, while for the system it is 1.46 miles of track per operated mile of road.

(*b*) The plaintiff also in the same year owned stocks, bonds, notes, advances to affiliated companies, and other investments, valued on its books at over $33,000,000.00, and it owned current and deferred assets, consisting of cash and claims for cash of substantial and large value. No part of the said stocks, bonds and other personal assets was situated in North Dakota or grew out of business of the plaintiff done in that state.

(c) The said assessment included bonds to the amount of $51,088,000.00 of the plaintiff or assumed by it, none of which were liens on property in North Dakota or represented any investment or property within that state.

(d) Whilst the plaintiff was not operating during the
22 taxable year its railway or railway property, the operation thereof by the Director General of Railroads realized during the taxable year a total railway operating revenue from local business in North Dakota of $147,607.07, and a total railway operating revenue in North Dakota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $2,839,039.03, whilst the total railway operating revenue from all transportation on said railway was in the same year $132,894,454.65.

(e) Whilst the said Tax Commissioner apportioned to North Dakota, as above shown, 3.68 per cent of the alleged total value of its stocks and bonds, various features of the railway operations carried on by the Director General by means of said railway show the train miles in North Dakota were 2.38 per cent of the total train miles; the locomotive miles were 1.97 per cent of the total locomotive miles; the freight train car miles were 2.44 per cent of the total freight train car miles; all car miles were 2.41 per cent of all car miles; gross operating revenue (including proportion of interstate revenue as above stated) was 2.25 per cent of the total gross operating revenue; the net operating revenue was 2.25 per cent of the total net operating revenue.

The said assessment determines the invested capital of the plaintiff in North Dakota to be $16,249,370.00. The State Board of Equalization placed a value on the property of the plaintiff for purposes of taxation, for 1918, of $4,768,063.00, which, under the statute, was 30 per cent of a full value of $15,893,543.00, and it is contended in said litigation that said valuation is excessive.

23 XV.

The special facts as to the assessment against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company are alleged to be as below stated in paragraphs (a) to (e), and the word "plaintiff" wherever used in these paragraphs means Minneapolis, St. Paul & Sault Ste. Marie Railway Company:

(a) The assessment was arrived at in this manner: The defendant, George Wallace, determined the fair average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $125,075,100.00, this amount being the par value, although the average market value as plaintiff verily believes did not exceed 85 per cent; determined the ratio of its North Dakota business to the total business of the plaintiff to be 41 per cent, which percentage he applied to the said valuation of plaintiff's stocks and bonds, thus determining North Dakota's proportionate share of capital invest-

ment to be $51,280,791.00; deducting legal exemption of $10,000.00 the fifty cents per $1,000.00 tax was laid on the balance, $51,270,-791.00. The ratio of 41 per cent was the ratio of plaintiff's operated main track mileage in the State of North Dakota to its total operated main track mileage as reported by plaintiff to the Railroad Commission of North Dakota in its report for the year ending December 31, 1918. This operated main track mileage was materially different from main track mileage owned by the plaintiff, and counted miles of track, main line, branch line, single track, second track, third track, or fourth track, excluding passing tracks, side tracks, industry tracks, and tracks in yards and terminals; took no account of the cost or value of any track, counting light and cheap single track branch line as equivalent to the heaviest and most expensive track. Over 75 per cent of plaintiff's operated mileage in North Dakota was branch line. The computation ignored the cost or value of plaintiff's large amount of track where construction is much more expensive, and left out of consideration its expensive terminals and yard tracks and property, notwithstanding North Dakota contains no large yards or terminals. There is no uniformity in the cost or value of plaintiff's railway in North Dakota as compared with
24 the cost or value of its railway in other states. The physical conditions in North Dakota are materially different from those in any of the said other states. In respect of yards and terminals North Dakota contains less than five per cent of cost or value, as plaintiff's system includes terminals of great expense and unusual value in Superior, Wisconsin; Duluth, St. Paul, Minneapolis in Minnesota, and Sault Ste. Marie, Michigan. This aggregate amount of all track, main and other track of plaintiff in North Dakota, is 1.13 miles of track per operated mile of road, while for the system it is 1.22 miles of track per operated mile of road.

(*b*) The plaintiff in the same year owned stocks, bonds, notes and advances to affiliated companies valued on plaintiff's books at over $11,815,000.00, and it owned current and deferred assets, consisting of cash and claims for cash of substantial and large value, no part of which was situated in North Dakota or grew out of business of the plaintiff done in that state.

(*c*) The said assessment included the following bonds of the plaintiff or assumed by it, none of which were liens on property in North Dakota or represented any investment or property within that state, viz.: $11,177,100.00 of plaintiff's Leased Line Certificates, which are related to Wisconsin Central Railway stock, and are neither stock nor bonds, and constitute no lien on plaintiff's railway or properties. Also $8,136,000.00 Minneapolis, Sault Ste. Marie & Atlantic First Mortgage bonds, which were a lien against property in Minnesota, Wisconsin and Michigan only.

(*d*) Whilst the plaintiff was not operating during the taxable year its railway or railway property, the operation thereof by the Director General of Railroads realized during the taxable year a total railway operating revenue from local business in North Dakota of $1,164,394.03, and a total railway operating revenue in North Da-

kota from interstate business (apportioning to that state as has long been customary a mileage proportion of each interstate earning equivalent to the mileage hauled in North Dakota compared to the total miles of haul) amounting to $4,678,031.43, whilst the total railway operating revenue from all transportation on the plaintiff's said railway was in the same year $22,111,665.73.

(e) Whilst the said Tax Commissioner also apportioned
25 to North Dakota, as above shown, 41 per cent of the alleged total value of its stocks and bonds, various features of the railway operations carried on by the Director General by means of plaintiff's railways show; the train miles in North Dakota were 30.6 per cent of the total train miles; the locomotive miles were 26.78 per cent of the total locomotive miles; the freight train car miles were 25.91 per cent of the total freight train car miles; all car miles were 26.74 per cent of all car miles; gross operating revenue (including proportion of interstate revenue as above stated) was 26.42 per cent of the total gross operating revenue; the net operating revenue was 21.91 per cent of the total net operating revenue.

The said assessment determines plaintiff's invested capital in North Dakota to be $51,280,791.00, but plaintiff alleges that the value of its property in North Dakota does not exceed $41,000,000.00.

XVI.

If said House Bill No. 47, properly construed, imposes a tax in proportion to the property of each corporate plaintiff actually invested in the transaction of local business in North Dakota, the tax would be determined by the proportion of said local business to the total businesss, and the railway operating revenues from local business in the taxable year were, as before shown, of the Northern Pacific Railway Company, $2,589,102.84, of the Great Northern Railway Company, $2,487,498.20 (including the Montana Eastern), of the Chicago, Milwaukee & St. Paul Railway Company, $147,607.07, of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, $1,164,394.00, and of the Farmers' Grain & Shipping Company, $40,648.63, whilst the railway operating revenues from the total property of said plaintiffs were, of the Northern Pacific Railway Company $102,908,259.47, of the Great Northern Railway Company
$100,661,066.74 (including the earnings from subsidiary
26 companies in Canada, the entire capital stock of which is owned by the plaintiff), of the Chicago, Milwaukee & St. Paul Railway Company $132,894,454.65, of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company $22,111,665.73, and of the Farmers' Grain & Shipping Company $100,116.15. The local business within the state of each plaintiff corporation was easily and certainly separable from its entire business, and the amount of local business and the amount of entire business was as to each of said plaintiffs easily and certainly ascertainable. On this basis the tax would be approximately 2.7 per cent of the Northern Pacific's total railway operating revenue, approximately 2.47 per cent of the Great North-

ern's total railway operating revenue, approximately .11 per cent of the Chicago, Milwaukee & St. Paul's total railway operating revenue, approximately 5.26 per cent of the Minneapolis, St. Paul & Sault St. Marie total railway operating revenue, and approximately 40.61 per cent of the Farmers' Grain & Shipping Company railway operating revenue. And if this is the proper interpretation of the Act, the assessments hereinbefore shown are plainly and grossly excessive and rest on an erroneous interpretation of the Act. On the other hand, if the Act is to be construed as the defendants have construed it, that is, as basing the tax on that part of its total stock and bonds equal to the proportion of each of the corporate plaintiffs' track mileage, the said assessments as before shown impose a tax on each of the corporate plaintiffs' property devoted to commerce among the states and with foreign nations, and a tax on such commerce in violation of Section 8, Article I of the Constitution of the United
27 States. They also operate to tax the property of each of the corporate plaintiffs in other states having no taxable situs in North Dakota, in violation of the Fourteenth Amendment to the Constitution of the United States. Moreover, as by the laws of North Dakota the corporate plaintiffs have no right to withdraw from local business and decline to transport it, the tax thereby becomes one on commerce among the states and with foreign nations, in violation of Section 8, Article I of the Constitution of the United States. The said Act taxes domestic corporations in proportion to their property within the state, and compared with domestic corporations, if construed as defendants have construed it, it discriminates against the corporate plaintiffs and other similar foreign corporations by taxing them on the mileage proportion of all their property, in violation of the Fourteenth Amendment to the Constitution of the United States.

XVII.

By the terms of the said House Bill No. 47 all moneys collected under the Act are payable into the state treasury to be used for defraying the general expenses of the state government, and plaintiffs are informed and believe that by the law of North Dakota no suit lies against the state to recover illegal taxes once paid. The remedy of suit against the Treasurer personally, is too uncertain to be adequate. If the tax is not paid within thirty days after demand, a penalty of ten per cent thereof immediately accrues and thereafter a penalty of one per cent for each month while the tax remains unpaid. Such delinquent tax is made by the Act a first lien upon all and singu-
28 lar the property, assets and effects of each of the corporate plaintiffs in North Dakota, taking precedence over all other demands and judgments against said property. Herein the delinquent tax becomes a lien and cloud on the title to each of the said plaintiffs' real property, taking precedence over all other liens and claims, including their mortgages. The Act also authorizes the Attorney General, in case the tax is unpaid, to institute proceedings for the collection thereof with penalty, by sale of the said property

or otherwise, and the Act makes it the duty of the Attorney General to enter such proceedings on the certification of the State Auditor that the tax is due and unpaid thirty days after demand, which demand has already been made. Unless the defendants are enjoined as herein prayed, the Attorney General will take such proceedings. When the tax shall have been delinquent for ninety days as shown by the certificate of the Tax Commissioner, the Act makes it the duty of the Secretary of State to cancel the registration of each of said corporate plaintiffs and to notify it that all its privileges under the laws of the State are suspended until such tax, together with all penalties provided in the act, has been paid. Unless enjoined as herein prayed, the Secretary of State will cancel the registration and authority of each of the plaintiffs to do business within the state.

XVIII.

Wherefore, inasmuch as the plaintiffs are remediless by the strict rules of the common law and are only relievable in equity, the plaintiffs pray:

That the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, may be required to make full and true answer to this bill of complaint (but not under oath, answer under oath being expressly waived);

That the said assessment and tax be declared null and void;

That the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, and each of them, may be perpetually enjoined and restrained from the collection of, or any attempt to collect, the said tax, or from entering any proceedings to enforce the same or the penalties described against the property of any of the plaintiffs or otherwise, and that the defendant, Thomas Hall, be perpetually enjoined and restrained from canceling the registration of each of the plaintiffs or otherwise interfering with its license and privilege to carry on business within North Dakota; and that a temporary restraining order be issued during the pendency of this action restraining the defendants and each of them as prayed;

That plaintiffs may have such other and further relief in the premises as the nature of the case shall require, and to Your Honors shall seem meet; and may it please Your Honors to grant also to plaintiffs a writ of subpœna to be directed to the said defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer, and Thomas Hall, and each of them, commanding them, and each of them, to appear and make answer to plaintiffs' bill of complaint at a certain time, and to abide the further order of the Court.

Dated November 25, 1919.

WALKER D. HINES,
Director General of Railroads,
By D. F. LYONS,
M. L. COUNTRYMAN,
H. H. FIELD,
H. B. DIKE,
General Solicitors.
N. C. YOUNG,
Fargo, N. D.;
C. J. MURPHY,
Solicitors for Plaintiffs.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
General Counsel.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY,
General Counsel.

CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY,
By BURTON HANSON,
General Counsel.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By A. H. BRIGHT,
General Counsel.

MONTANA EASTERN RAILROAD COMPANY,
By E. C. LINDLEY,
General Counsel.

FARMERS' GRAIN & SHIPPING COMPANY,
By E. C. LINDLEY,
Counsel.

31 STATE OF MINNESOTA,
County of Ramsey, ss:

Charles Donnelly being duly sworn deposes and says he is the Executive Vice President of the Northern Pacific Railway Company, one of the plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same pertaining to the Northern Pacific Railway Company are true to his own knowledge, except as to

matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

CHARLES DONNELLY.

Subscribed and sworn to before me this 22nd day of November, 1919.

EDWIN IRLE,
[SEAL.] *Notary Public, Hennepin County, Minnesota.*

32 STATE OF MINNESOTA,
County of Ramsey, ss:

George R. Martin, being duly sworn deposes and says he is Vice President and Comptroller of the Great Northern Railway Company and Comptroller of the Montana Eastern Railway Company and Farmers Grain & Shipping Company, plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same pertaining to the above named companies are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes them to be true.

GEORGE R. MARTIN.

Subscribed and sworn to before me this 26th day of November, 1919.

J. A. STENKS,
[SEAL.] *Notary Public, Ramsey County, Minn.*

33 UNITED STATES OF AMERICA,
Northern District of Illinois, County of Cook, ss:

J. Welch, being first duly sworn, deposes and says that he is an officer, to wit: Comptroller of the Chicago, Milwaukee & St. Paul Railway Company, one of the railroads in possession and control of Walker D. Hines, Director General of Railroads, plaintiff in the above entitled suit; that he has read so much of the foregoing Bill of Complaint as pertains to the Chicago, Milwaukee & St. Paul Railway Company and knows the contents thereof and that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

J. WELCH.

Subscribed and sworn to before me this 24th day of November, A. D. 1919.

W. D. MILLARD,
[SEAL.] *Notary Public, Cook County, Illinois.*

34–101 STATE OF MINNESOTA,
County of Hennepin, ss:

E. Pennington, being duly sworn, deposes and says that he is the President of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, one of the plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same, pertaining to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, are true to his own knowledge, except as to matters expressly stated therein upon information and belief, and as to those matters he believes it to be true.

(Signed) E. PENNINGTON.

Subscribed and sworn to before me this 25th day of November, 1919.

[NOTARIAL SEAL.] ALFRED BJORKLUND,
Notary Public, Hennepin County, Minn.

* * * * * * *

102 Indorsed on back as follows: "Filed No. 28, 1919. J. A. Montgomery, Clerk."

Motion for Restraining Order.

(Title of Case.)

Now come the plaintiffs, above named, and at the time of the filing and presentation to the court of their Bill of Complaint herein, move the court for a temporary injunction pending the determination of the action restraining the defendants, and each of them, as prayed for by the plaintiffs in their Bill of Complaint.

An- request the presiding judge of this court to convene three judges to hear such application for a temporary injunction as provided by statute.

Plaintiffs further move the presiding judge of this court to grant a temporary restraining order pending the convening of the three said judges and restraining the defendants, and each of them, pending the hearing and determination by said three judges, from

the commission of any of the acts threatened by them and described in plaintiff's bill of complaint.

Dated November 28th, 1919.

WALKER D. HINES,
Director General of Railroads,
By D. F. LYONS,
M. L. COUNTRYMAN,
H. H. FIELD,
H. B. DIKE,
General Solicitors.

N. C. YOUNG,
Fargo, N. D.;
C. J. MURPHY,
Solicitors for Plaintiffs.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN,
General Counsel.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY,
General Counsel.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By BURTON HANSON,
General Counsel.

163 MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By A. H. BRIGHT,
General Counsel.

MONTANA EASTERN RAILWAY COMPANY,
By E. C. LINDLEY,
General Counsel.

FARMERS' GRAIN & SHIPPING COMPANY,
By E. C. LINDLEY,
Counsel.

Indorsed on back as follows: "Filed Nov. 28, 1919. J. A. Montgomery, Clerk."

Record of Proceeding.

(Title of Case.)

4 Proceedings Had Before Judge Charles F. Amidon, at His Chambers at the Federal Buildings, at 6 o'clock P. M. Friday, November 28, upon the Presentation and Filing of the Bill of Complaint in the Above-entitled Case.

C. W. Bunn, Esq., D. F. Lyons, Esq., and Hon. N. C. Young, peared on behalf of the Northern Pacific Railway Company;
E. C. Lindley, Esq., and C. J. Murphy, Esq., appeared on behalf the Great Northern Railway Company.
E. C. Lindley, Esq., appeared on behalf of the Montana and East- n Railway Company, and also on behalf of the Farmers' Grain & ipping Company.
Hon. Albert E. Sheets, Jr., Assistant Attorney General, appeared behalf of the defendants.

Thereupon the following proceedings were had:

5 Mr. Bunn: We wish to present to the Court a bill of complaint of Walker D. Hines, Director General of Rail- ds, Northern Pacific Railway Company, Great Northern Rail- y Company, Chicago, Milwaukee and Saint Paul Railway Com- ny, Minneapolis, Saint Paul and Sault Sainte Marie Railway mpany, Montana Eastern Railway Company, and Farmers' Grain d Shipping Company, against the state officers who are charged h the execution of the law complained of in the Bill, namely, orge Wallace, State Tax Commissioner, Obert A. Olson, State easurer, Carl R. Kositzky, State Auditor, William Langer, At- ney General, and Thomas Hall, Secretary of State.
The bill is filed to restrain the enforcement of an assessment on e right of railway companies to do business in North Dakota under e terms of a law that was passed last winter, commonly called ouse Bill 47, which provides—I will not state its provisions in ail.—which provides as to foreign railway companies doing busi- ss here that each one shall pay a tax called in this bill a special ise tax with respect to the carrying on and doing business in the te by such corporation, &c., of 50 cents for each $1000, of the cap- l actually invested in the state. And it is provided in case the rporation is engaged in business partly within and partly without e state, investment within the state shall be held to mean that portion of its entire stock and bond issues which its business hin the state bears to its total business within and without the te, and where such business within the state is not otherwise more ily and certainly separable from such entire business within and hout the state, business within the state shall be held to mean h proportion of the entire business within and without the state as the property of such corporation within the state bears to 6 its entire property employed in such business both within and without the state; provided, that in the case of a rail-

road, telephone, telegraph, car or freight line, express company, or other common carrier, or gas, light, power or heating company, having lines that enter into, extent out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its mileage within and without the state, with an exemption of $10,000.

The bill alleges the proclamation of the President taking over the railroads, the passage of the act of congress providing for the federal control by the President and his subordinates, the appointment of the Director General, and his designation by the President as the President's agent to work the railways, and the succession of Mr. Hines to the original appointment conferred on Mr. McAdoo. Then the assessments of the various companies are set out in a general way, which I need not dwell on. It is then alleged that the defendants are officers of the State of North Dakota, duly qualified and acting as such; George Wallace is the State Tax Commissioner; Obert A. Olson is the State Treasurer; Carl R. Kositzky is the State Auditor; William Langer is the Attorney General, and Thomas Hall is the Secretary of State. Then follows the jurisdictional averment that this case arises under the Constitution of the United States, both with respect to the provisions which forbids a state to take property without due process of law, and which has been held to forbid a state to tax property beyond its borders, and with respect to the provisions which gives congress the power to regulate commerce among the states.

It is then alleged that before this bill was passed all property and franchises of each one of these plaintiffs, railway companies,
107 were assessed at their full value, at least at a theoretical or alleged full value, and that those values are in controversy, and not admitted by the defendants, and in each case is claimed to be too much, and the litigation is referred to as pending in this court, with which Your Honor is familiar. That allegation is made simply to show that this tax is in addition to a full property tax. I ought to have said to Your Honor in passing—omitted to do so—that Mr. Hines is plaintiff because it is alleged in the bill that in the Act of Congress and in the contract which was made under it with these companies, it is provided that the Director General shall pay or protect the corporations from paying all taxes on their property taken over, and all taxes on their right to do business during the period of the federal control. This tax was levied for the year 1918, and comes under that contract.

The Court. You say that the statute provides that the Director General shall protect these properties against the payment of state taxes?

Mr. Bunn: Yes.

The Court: You mean by that unjust taxes, or against all taxes?

Mr. Bunn: All taxes, all taxes, whether just or unjust. The Director General is to pay them, pay all taxes levied against our property either by the federal government or any state government while that property is under federal control, or levied on their right to do business. You see the reason for that is that the earnings of the test period, that is, the three years before federal control, have

been taken as the acknowledged just measure of compensation for the use of the properties. Those earnings were ascertained after charging to operating expenses all federal taxes and all state
108 taxes, so that to get to the same basis of earnings, to get to that basis of earnings, the government had to say that it would pay all the taxes during federal control, I will read if Your Honor has any——

The Court: No, I do not ask you to read it. It was different from what I had supposed the law to be. I had supposed that the railroad properties were subject to the ordinary charges for taxation even during the time they were under federal control.

Mr. Bunn: They are.

The Court: They are?

Mr. Bunn: They are.

The Court: Well, that is what I understood.

Mr. Bunn: All I say to your Honor is that by the contract with the Director General he assumes those taxes and agrees to protect the railroad companies, and therein stands his right to be plaintiff in this suit.

The Court: Oh, well, as to that I do not question that.

Mr. Bunn: It is then alleged that the defendant, George Wallace, demanded of each of the corporate plaintiffs a return for taxation under this law, and their returns are attached to the bill as exhibits.

The first point in this bill is that the act of the State levying this tax on the doing of business by corporations, was modeled upon if not copied from the Acts of Congress to similar effect. The Acts of Congress, before the adoption by the state of House Bill No. 47, had been construed not to impose a tax upon corporations which had ceased to perform the functions for which they were chartered and incorporated, and specifically that a railroad company which
109 had leased its railroad to another operator receiving some compensation in the way of rental or similar compensation, was not subject to the tax imposed with respect to doing business by a corporation. Specifically we allege in this bill that since this Act of North Dakota was passed, these corporations have been held by the Federal Administration to be exempt from paying this tax imposed by the Federal Government on the ground I have stated. Now, that is the first point in the bill.

It is alleged that notwithstanding this return Mr. Wallace levied a tax against the Northern Pacific of $55,000 and some odd dollars, with respect to its doing business in the year 1918, when, as I have said, the Director General was doing its business. A tax of $49,658. (I will not read the odd cents), was levied against the Great Northern; a tax of $8,119 was levied against the Chicago, Milwaukee & St. Paul Railway Co.; a tax of $223 against the Montana Eastern Railway Company, and a tax of $187 against the Farmers Grain & Shipping Company. I will call attention—for it is applicable to all these companies,—I think it is only necessary for me to call attention to the Northern Pacific allegations with respect to this case. They are repeated in the bill as to the Great Northern, the Soo, the

Milwaukee, and these other companies, with some slight variations, because the facts as to each company are somewhat different, but the allegations are illustrated by what is said with respect to the Northern Pacific.

First, that the said assessment was arrived at in this manner: The defendant, George Wallace, determined the fair, average value of the capital stock and bonds of the plaintiff for the calendar year 1918 to be $476,000,000 plus. I will say right here there is no fault found in the bill with that determination. He determined the ratio of its North Dakota business to the total business of the
110 plaintiff to be 23.07 per cent, which percentage he applied to this total value of stocks and bonds and reached the sum of $110,000,000 plus, which is correct computation. Deducting $10,000 exemption, and assessing the tax of 50 cents on each $1000, he arrived at $55,000. Now, the computations are all right. The ratio of 23.07 per cent was the ratio of plaintiff's operated miles of main track in North Dakota compared with all its operated miles of main track, and the Tax Commissioner has therefore determined that all the value of these stocks and bonds, or $476,000,000 plus, was represented by track, and that that track was of comparatively uniform value, so that a just basis could be determined by taking the mileage proportion. We say in respect of that that this computation excluded passing tracks, side tracks, industry tracks, and tracks in yards and terminals; took no account of the cost or value of any track, counting light and cheap single track branch line as equivalent to the heaviest and most expensive track, and that over 75 per cent of plaintiff's operated mileage in North Dakota was branch line. I will say that that proportion holds very well in the case of the Soo, the Great Northern and the Milwaukee Railroad. The computation ignored the cost or value of plaintiff's large amount of track in mountainous regions, where construction is extremely expensive, and left out of consideration its expensive terminals and yard tracks and property, such points as are mentioned, as for instance, Superior, Wisconsin, Duluth, St. Paul and Minneapolis, in Minnesota, Spokane, Tacoma and Seattle in Washington, Portland in Oregon, Butte in Montana, and many minor points. It is alleged that there is no considerable terminal property in North Dakota, indeed possibly less than four per cent of the terminal
111 property of the Northern Pacific is in North Dakota.

In the second place it is stated that the said main track mileage apportionment ignored the Northern Pacific's land grant, which, of course, was reflected in the value of those stocks and bonds, but not in the tracks; had nothing to do with the track; and we state the remainder of that land grant is estimated to be worth $35,000,000. It is the best estimate we can put on them; besides which the Northern Pacific was the owner of iron and other lands in Minnesota contained in grants made by Congress to the Lake Superior & Mississippi Railroad Company and to the Taylors Falls and Lake Superior Railroad Company which were of the estimated value of $16,000,000. Besides it is alleged that the plaintiff in the same year owned stocks, bonds, notes and advances to affiliated companies

valued on plaintiff's books at $171,000,000 and other investments consisting of bonds valued on plaintiff's books at over $7,723,000, and it owned current and deferred assets consisting of cash and claims for cash of substantial and large value, and no part of the said stocks, bonds and other personal assets was situated in North Dakota, or arose out of business transacted in the state.

Next, Your Honor may have noted a peculiarity in this law, in which it differs from the Federal Act, and, so far as I know, from other similar acts, in this, that it includes stocks and bonds in determining the basis of computing the proportion of it. The Federal Act values only the stock, but this state has put in bonds. Now, that operates in this way: The inclusion of bonds—it is stated in the next paragraph of the bill that they included of Northern Pacific bonds, St. Paul-Duluth Division bonds, (that is the division between St. Paul and Duluth, formerly the St. Paul & Duluth Rail-
112 road), valued at $6,504,400, which do not represent, and could not represent any investment in this state. Also bonds of the St. Paul & Northern Pacific Railway Company General Mortgage Bonds, which is entirely in Minnesota, but which have been assumed by the plaintiff and are carried in its obligations, amounting to $8,074,894, which represented nothing in this state; St. Paul & Duluth Railway First Mortgage bonds, assumed by the Northern Pacific, valued at $980,000, which represented property in Minnesota and Wisconsin only; and St. Paul and Duluth Railway Consolidated Mortgage bonds, valued at $782,500, of which the same facts are true; Washington & Columbia River Railway First Mortgage bonds, assumed by the plaintiff, valued in this computation at $112,000, which represented property in the State of Washington only; and a liability of the Northern Pacific of $101,557,087 incurred in the purchase of a one-half interest in the Chicago, Burlington & Quincy Railroad. That obligation is outstanding and unpaid. The Great Northern is liable for the same amount, the obligation of the two companies being double the amount stated, or $202,000,000. It is stated in the bill that that $101,000,000 represents nothing in North Dakota, the Chicago, Burlington & Quincy Railroad being entirely in other states.

Next it is alleged that while the plaintiff, railway company, was not operating during the taxable year its railway or railway property, the following are some of the results of the Director General's operations in North Dakota. He realized from local business in North Dakota $2,589,000, and his total earnings on the system were $102,000,000, which is some two and a half per cent on the comparison of local business with the whole business, and if you add the business which he did in North Dakota, that is the proportion of interstate commerce that he carried through, proportioned to North
113 Dakota in the customary way according to the number of miles of haul in each case, he earned $14,000,000 from that source; and the total of that interstate commerce business and the local business would be about sixteen per cent of the total earnings. The train miles in North Dakota were 17.7 per cent of all its train miles; the locomotive miles were 15.3 per cent of the total locomo-

tive miles; the freight train car miles were 16.9 per cent of the total freight train car miles; all car miles were 16.95 per cent of all car miles; gross operating revenue (including properties of interstate revenue as above stated), was 16.25 per cent of the total gross operating revenue, and as I said the local revenue in North Dakota was about two and a half per cent in the case of the Northern Pacific of all its operating, all the Director General's operating revenue from the property of the Northern Pacific for the year 1918.

We allege next that over ten years ago the plaintiff established a department or bureau for valuing its own property, of course, foreseeing the federal valuation which is now in full swing and activity, and it has carried this work on in a large way ever since. It has expended the best effort within its power and expended several hundred thousand dollars to determine said valuation, taking inventories, measuring up quantities, finding unit prices and applying them. It has now proceeded so far as to be certain that a fair estimate of reproducing its property in North Dakota new, without depreciation, does not exceed $81,000,000. I might say in respect of that, as my friend on the other side knows, the Chief Engineer of the Company testified in that other case that is pending in this court that the full cost of reproducing the Northern Pacific new in North Dakota, in his valuation he determined to be about $72,000,000. I do
114 not state the odd figures. Possibly some additions should be made to that—I don't know whether it should be—for goodwill, going-concern value. That is a question the Federal Government has not yet settled; the Interstate Commerce Commission has not intimated what its view is, but they have intimated that there must be some substracting from it, and a substantial one. That original cost of reproducing new must be depreciated to get a true value. So that, as we stand today, in that Federal valuation, our own testimony is that to reproduce the road new in North Dakota would cost about $72,000,000, the physical value, which must be depreciated; and this state officer values us, under this law, at $110,000,000, and the State valued us under the property tax law at $97,000,000 I think in 1917, and $94,000,000, unless I am mistaken, in 1918, so this is the highest valuation we have heard of by a good deal.

Now, we allege in conclusion, we suggest in the bill that there are two constructions of this clause in the law which I have read to you. My friend, Mr. Lindley, who is a very good lawyer, as Your Honor knows, contends, and always has contended that it should have only the first construction, which I will state, and that is, it levies a tax to be determined by the proportion of the business done locally in North Dakota to the entire business, which is about two and a half per cent and if it were construed that way we would not have been here complaining. But there is another interpretation, and the defendants have put the other interpretation on it, which is to ascertain the value of all the stocks and all the bonds that the company had, the average value during the year 1918, and take that proportion thereof which the number of miles of track it had in North Dakota bears to
115 the whole number of miles of track; and we say if the Act is to receive the interpretation that the gentlemen, the defendants,

have put upon it, it is invalid, and in either event the tax is invalid. It is invalid, as we say, because the necessary result—I have pointed out the facts briefly—the necessary result of taxing the whole stock and bond issue by the proportion of miles of track in this state has the necessary result that it levies a tax on property outside of this state and on property that is an instrumentality of interstate commerce, and it is invalid under the case of Farwell vs. Hart, which your Honor is familiar with, in the Supreme Court of the United States, and a long list of other decisions, the latest of which are in almost the last volume.

Now, one other word: This act makes this provision, that this draft of the State Treasurer being drawn, and it has been drawn as alleged in the bill, and delivered to these companies about the 3rd of November——

The Court: It was drawn?

Mr. Bunn: Drawn by the State Auditor and presented to each company through the State Treasurer on or about the 3rd day of November. By the terms of this act we have thirty days in which to pay. That will mean say the 3d day of December. What happens if we do not pay them? That is what I am asking about. What remedy do we need here? If we do not pay then the State Auditor shall certify that fact to the Attorney General. It shall be the duty of the Attorney General thereupon to proceed to collect this tax by enforcement against the property of these companies, or otherwise. That is the language. The tax is made by the terms of the act a lien on these properties ahead of all other liens and claim whatsoever. In ninety days after the default it is made the duty of
116 the Secretary of State to forfeit the privilege to do business in the state which the state has conferred on each of these companies. We think we have a meritorious case here, and I do not care to urge the merits on your Honor. I do not think it is the place for it because they must be heard by three judges; but Your Honor has a right to grant a temporary restraining order. I do not want it unless it is necessary. If the defendants here appear and say they will take no steps to enforce the lien created by this act against the property, and that no steps will be taken, I shall be content with that, and shall not ask for any relief here at all. I suggested that to Judge Sanborn yesterday. He said that they commonly did, and they no doubt would do it here. If they decline to do that, it seems to me we are entitled to a temporary restraining order to prevent the collection, levy and seizure of anything to enforce this tax, or take any steps to forfeit the charter, until this court can hear the case. I have not gone into the grounds of equity jurisdiction, but they are well within the decisions of the Supreme Court.

The Court: What is the attitude of the Attorney General?

Mr. Sheets: Well, Your Honor, this law was enacted, and is a law on the statute books of this state. I have not given this lawsuit the attention it ought to have, but I am here to state that unless that tax is paid the levy will be made; unless this court takes some action we intend to make the levy.

The Court: The levy, I understand, has already been made.

Mr. Sheets: We are going to enforce it by seizure, as the law gives

us authority to do. It is our contention that this law is valid in all respects, and it is not an unjust law, and there has been no improper valuations placed on their property, and at least the presumption
117 is in favor of the officers who imposed that levy. The presumption is that the state officials are not making improper levies. We appear before the court with that argument to present, and ask that this temporary injunction be not granted. I have not time to go into the merits of the case, in fact the bill was served on us but recently.

Mr. Bunn: You understand this court cannot grant a temporary injunction.

The Court: I cannot grant any temporary injunction; all I can do is to grant a restraining order.

Mr. Sheets: I mean restraining order. I misspoke myself.

Mr. Bunn: I ought to say another word with Your Honor's permission. I think the court ought to know it. I had a talk with Judge Sanborn yesterday about the possibility and feasibility of getting an early hearing. I said to Judge Sanborn, "So far as we are concerned on our side of the case we are ready now." It will all rest with the Attorney General. If he is ready to hear it at St. Louis next week, or the week after, it can be heard there. It has probably got to be heard at St. Louis because the judges are all congregating there. The only caution Judge Sanborn gave me was they did not like to stay there between Christmas and New Year's. They would hear it before Christmas or after New Year's, and we are ready for the earliest hearing that the court can give us and the Attorney General consent to.

The Court: And Judge Sanborn gave you some assurance that if you could appear there at almost any date within the next fifteen days or so, that a properly constituted court would be willing to hear it?

Mr. Bunn: He said, for instance, Judge Hook would be there the first week without any assignment on the Court of Appeals;
118 That Judge Stone would be there without any assignment, and he would select the court. He wanted to hear from you or me by Monday, and he will organize a court next week or any time up to next Christmas to hear this case; and if it gets too close to Christmas, he asked to have it after the first of January. That was all.

The Court: Well, it ought to be heard promptly. That is the only thing I think of. It is a difficult and complex matter, and it would involve a very careful examination of this bill upon my part of I were to go into even the preliminary matters of the litigation. I had supposed that the Attorney General's office would cooperate in this case as it has in other cases, to the extent of deferring action under the law until the case can be heard, there being an assurance that the hearing will be prompt, and that assurance being stated here in court. I do not desire to exercise any duress upon the Attorney General's Office, but it seems to me that is the quiet and orderly method of dealing with it.

Mr. Sheets: The reason for making the objections at this time is the state is being embarrassed financially because of a good many of these lawsuits, and it has been the contention of the Attorney General all the time that these taxes were due and should be paid, and the litiga-

tion should follow afterwards to recover, if any recovery is due from the State. The State should not be hampered in the collection of its taxes. That is the reason we are going to insist on prompt action unless we are restrained. We do not believe there is any ground for restraining us here at all.

Mr. Bunn: We allege in our bill that there is no statute in this state to authorize a suit against the state to recover the tax if we paid it, and it should finally be decided it was invalid.

Mr. Sheets: That is an argument that has been made in all
119 these cases. There is a remedy by which they may recover the taxes. The State can submit to a lawsuit if it so desires, and in certain instances there are provisions made for the repayment of the taxes.

The Court: The bill itself presents a very complex issue, difficult to follow upon a mere oral statement. It is the opinion of plaintiffs here that unless a temporary restraining order is issued, the property will be seized, and it would lead right on to the forfeiture of the right of the Company to do business in the State. Those are the provisions of the statute as I gather them from Mr. Bunn's statement.

Mr. Bunn: I will read the statute to Your Honor, if you wish.

The Court: No, I do not ask you to read it, but that is in substance the provision of the statute, and that unless there is a restraining order those steps will be taken before a hearing can be had before the three judges to pass upon the question as to whether the law is valid, and a temporary injunction shall be granted during the hearing of the case on the merits. Now, I think the case comes within the scope of a well-established rule, that a showing has been made sufficient to justify the court in finding that the damages are irreparable, and are reasonably sure to follow unless a restraining order is granted. That is I know your contention, Mr. Bunn.

Mr. Bunn: Yes.

The Court: When can the matter be heard?

Mr. Bunn: We are ready any time.

The Court: Mr. Attorney General, there cannot be any court empaneled here. I am not going to sit in the case. I will say that to you very frankly. I am not going to take on any more new business. The case will have to be heard probably at St. Louis. There is
where the Circuit Judges are in connection with a term of the
120 Circuit Court of Appeals at this time. Will it be satisfactory to you to attend there?

Mr. Sheets: We would have no objection, I think, to going to St. Louis.

The Court: Then I shall be obliged to leave it to counsel to arrange for the proper tribunal for the hearing of such a cause, and to insist that that arrangement be made so that the case may be heard before the court adjourns over the holidays.

Mr. Bunn: Judge Sanborn was leaving tonight for St. Louis, and would not be available for telegraphic communication, and suggested I write, or Judge Amidon write, and on receipt of this letter he would arrange for the court.

The Court: I think I will ask counsel to arrange for a tribunal because I have all the afflictions I care to be troubled with at the pres-

ent time, and I will grant you a temporary restraining order until the case can be heard before the three judges, if you have such an order made.

Mr. Bunn: I have not, but I suppose it would follow the usual language, that the defendants, naming them, be perpetually enjoined and restrained from the collection of, or attempting to collect the tax, or any part thereof, or from any proceeding to enforce the same, or the penalties prescribed, against the property of the plaintiffs, or otherwise; and that the defendant, Thomas Hall, be perpetually enjoined and restrained from cancelling the registration of each of the plaintiffs, or otherwise interfering with its rights and privileges to carry on and do business within the state, and that a restraining order be issued to the same effect. I think I have stated the proper effect of that temporary restraining order.

The Court: You say you have not prepared the order?

121 Mr. Bunn: I have not. I can get it tomorrow.

The Court: Well, it is simply a formal order. I was in hopes you would have it here so I could sign it and end the matter.

Mr. Sheets: It will be satisfactory to us if Judge Young presents it tomorrow. I would rather it be done without my appearance on the part of the state, because I will be busy in District Court.

The Court: Very well.

Mr. Sheets: We would prefer to be heard some time after the 15th of December.

Mr. Bunn: Suppose we say between the 15th and 20th?

Mr. Sheets: That will be agreeable. The state waives a formal restraining order. We have no objection to letting the record simply show that the order was granted.

The Court: Very well. Then upon the announcement of the court that it will grant a restraining order, you undertake on behalf of the State that until this case is disposed of by three judges who are to hear the application of the plaintiffs for a temporary injunction, during the pendency of the suit, the State will take no action for the enforcement of the tax such as is referred to in the bill?

Mr. Sheets: That will be the understanding, yes, Your Honor.

Mr. Bunn: If you agree to that it saves typewriting.

Mr. Sheets: Yes.

The Court: That is sufficient, and no formal restraining order will be issued. It is the understanding, as I gather from the colloquy that has passed between counsel, that a date for the hearing of the application before three judges in St. Louis shall be between the 15th and 20th of December?

Mr. Bunn: If possible, if possible.

122 The Court: According to the convenience of the judges who are to hear the case, and that the Attorney General of the state agrees that the argument in respect of the temporary injunction shall be had at St. Louis?

Mr. Sheets: Yes, we agree to that, Your Honor.

The Court: Very well.

Indorsed on back as follows: "Filed Nov. 28, 1919, J. A. Montgomery, Clerk."

123 *Notice of Hearing Application for Temporary Restraining Order.*

(Title of Case.)

Affidavit of Service.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

E. M. Kafer, being first duly sworn, says that he is more than twenty-one years of age, by occupation, deputy sheriff in and for Burleigh County, North Dakota, and not a party to nor interested in the above entitled action; that the within Notice of Hearing Application for Temporary Restraining Order came into affiant's hands for service on the 6th day of December, 1919, and that at Bismarck, on the 6th day of December, 1919, affiant served the same, which is hereto attached, on George Wallace, Obert Olson, Carl R. Kositzky, William Langer and Thomas Hall, the above named defendants, and on Lynn J. Frazier, Governor of the State of North Dakota, by delivering a copy thereof to each of said defendants personally and to said Lynn J. Frazier personally.

E. M. KAFER.

Subscribed and sworn to before me this 6th day of December, A. D. 1919.

[SEAL.] B. F. TILLOTSON,
Notary Public, Burleigh County, N. D.

My commission expires Mar. 19, 1920.

124 (Title of Case.)

Notice of Hearing Application for Temporary Restraining Order.

To the Defendants above named and to Lynn J. Frazier, as Governor of the State of North Dakota and William Langer, as Attorney General of the State of North Dakota:

Please take notice that the plaintiffs, above named will bring on for hearing before the court its application for a temporary injunction in the above entitled action, said hearing to be had in the court room of the U. S. Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, State of Missouri, at the hour of ten

o'clock a. m., on Wednesday, December 17th, or as soon thereafter as counsel can be heard.

D. F. LYONS,
M. C. COUNTRYMAN,
H. H. FIELD,
H. B. DIKE AND
N. C. YOUNG,
Attorneys for Walker D. Hines, Director General of Railroads.
C. W. BUNN,
Attorney for Northern Pacific Railway Company.
A. H. BRIGHT,
Attorney for Minneapolis, St. Paul & Sault Ste. Marie Railway Company.
BURTON HANSON,
Attorney for Chicago, Milwaukee & St. Paul Railway Company.
E. C. LINDLEY,
Attorney for Great Northern Railway Company, Montana Eastern Railway Company, and Farmers' Grain & Shipping Company.

Indorsed on back as follows: "Personal service of the within notice is hereby admitted this 6th day of December, 1919, at Bismarck, N. D. William Langer, Attorney for Defendants. Filed Dec. 22, 1919. J. A. Montgomery, Clerk."

125 *Order for Injunction.*

(Title of Case.)

The motion for temporary injunction coming on for hearing at St. Louis, Missouri, on the 17th day of December, A. D. 1919, at 10 o'clock A. M., pursuant to notice duly given before the undersigned, Mr. Charles W. Bunn, Mr. Burton Hanson, Mr. M. L. Countryman, Mr. D. F. Lyons, and Mr. A. H. Bright appearing for the plaintiffs and Mr. F. E. Packard, Assistant Attorney General of North Dakota, appearing for all of the defendants, and after due consideration it is ordered:

That the defendants, George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall, and each of them, be temporarily restrained during the pendency of this action and until the further order of this court from collecting or making attempt to collect the tax set up in the bill of complaint or from entering any proceeding to enforce the same or the penalties set forth in the bill against the property of any of the plaintiffs or otherwise, and the defendant, Thomas Hall, is similarly restrained from cancelling the registration of either of the plaintiff-co-porations or from otherwise interfering with its license or privilege to carry on business in North Dakota, and on filing this order a writ of injunction will issue accordingly.

This order is conditioned on a bond being given by or on behalf of the plaintiffs in the penal sum of ten thousand dollars ($10,000.00) conditioned on the payment of such costs and damages as may be incurred or suffered by any party who may be found may have been wrongfully enjoined or restrained by this order or the writ of injunction issued in accordance therewith.

By the Court:

WALTER H. SANBORN.
THOS. C. MUNGER.
C. B. FARIS.

Indorsed on back as follows: "Filed Dec. 22, 1919. J. A. Montgomery, Clerk."

126 *Bond.*

(Title of Case.)

Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee & Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, plaintiffs in the action above entitled, acknowledge themselves indebted to George Wallace, Overt A. Olson, Carl R. Kositzky, William Langer and Thomas Hail, defendants in the action above entitled, in the penal sum of ten thousand dollars, for the payment of which they bind themselves, and their successors and assigns, jointly and severally by these presents.

The condition of this obligation, however, is such that if the plaintiffs in the action above entitled shall at all times pay all such costs, and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by that certain order for injunction made by this court in the action above entitled on the 17th day of December, 1919, or by the writ of injunction issued in pursuance of said order, then this obligation shall be void; otherwise in full force.

In witness whereof the above named obligors have executed this instrument under their corporate seal and under the hands of their respective officers duly authorized.

NORTHERN PACIFIC RAILWAY COMPANY.
By C. W. BUNN,
[SEAL.] *Vice President.*

Attest:
R. H. RELF,
Assistant Secretary.

GREAT NORTHERN RAILWAY COMPANY.
By E. C. LINDLEY,
[SEAL.] *Vice President.*

Attest:
F. S. PATZARD,
Secretary.

CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY,
By W. E. BRYAN,
[SEAL.] *President.*

Attest:
C. W. ADAMS,
Secretary.

127 MINNEAPOLIS, SAINT PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY,
By E. C. PENNINGTON,
[SEAL.] *President.*

Attest:
G. W. WEBSTER,
Secretary.

I hereby approve the foregoing undertaking both as to form and as to sufficiency.

F. E. PACKARD,
Assistant Attorney General."

Indorsed on back as follows: "Filed Jan. 6, 1920. J. A. Montgomery, Clerk."

128 Title of Case.

The President of the United States of America to the Defendants, Above Named, Greeting:

Whereas, Walker D. Hines, Director General of Railroads, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Minneapolis, St. Paul & Sault Sainte Marie Railway Company, Montana Eastern Railway Company and Farmers' Grain and Shipping Company, plaintiffs and complainants in the above entitled cause, have filed a bill against the above named defendants for the purpose of permanently enjoining the defendants from enforcing a collection of the taxes authorized by House Bill No. 47, of the Laws of North Dakota, approved March 7th, 1919, and described in the Bill of Complaint, and in connection therewith obtained an allowance of an injunction during the pendency of the action and until the further order of the court:

Now, therefore, we, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall, and each of you, from collecting, or attempting to collect, the taxes set up in the Bill of Complaint, or from entering any proceedings to enforce the same or the penalties set forth in the Bill,

against the property of any of the plaintiffs, or otherwise, and the defendant, Thomas Hall, is similarly restrained from canceling the registration of either or any of the plaintiff corporations, or from otherwise interfering with their license or privilege to carry on business in North Dakota during the pendency of this action and until the further order of this court, which command and injunction you are respectfully required to observe and obey until the said court shall make further order in the premises.

Hereof fail not under penalty of the law thence ensuing.

Witness the Honorable Charles F. Amidon, Judge of the District Court of the United States of America this 13th day of January, 1920. Issued at my office in the City of Fargo under the seal of said court the day and year last aforesaid.

[SEAL.]

J. A. MONTGOMERY,
Clerk,
By E. R. STEELE,
Deputy.

Indorsed on back as follows: Filed January 13th, 1920. J. A. Montgomery, Clerk.

129 *Petition for Appeal and Order Allowing Same.*

(Title of Case.)

The above named def-ndants conceiving themselves aggrieved by the order entered on December 17th, 1919, in the above entitled proceedings, do hereby appeal from said order to the Supreme Court of the United States and pray that this appeal be allowed.

WILLIAM LANGER,
Attorney General;
F. E. PACKARD,
Asst. Attorney General,
Attorneys for Defendants.

Order of Allowance.

On January 6th, 1920, ordered that the above appeal be allowed as prayed.

CHARLES F. AMIDON,
Judge.

Indorsed on back as follows: "Filed Jan. 13, 1920. J. A. Montgomery Clerk."

Praecipe for Appeal.

(Title of Case.)

To J. A. Montgomery, Clerk of the above Court:

You are hereby directed to prepare and certify a transcript of the record in the above cause, for the use of the United States Supreme Court, by including therein the following:

Bill of Complaint with Exhibits Attached.
Motion for Restraining Order.
Record of Proceedings.
Notice of Hearing Application for Temporary Restraining Order.
Bond.
Order for Injunction.
Injunction.
Petition for Appeal and Order Allowing Same.
Praecipe for Appeal.
Original Citation.
Dated this 14th Day of January, A. D. 1920.

WILLIAM LANGER,
FRANK E. PACKARD,
Solicitors for Appellant.

Service of the above praecipe is hereby admitted at Fargo, North Dakota, this 16th day of January, A. D. 1920.

N. C. YOUNG &
E. T. CONMY,
Solicitors for Appellees.

Indorsed on back as follows: "Filed Jan. 16, 1920. J. A. Montgomery, Clerk.

130 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To Walker D. Hines, Director General of Railroads; Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee and Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, Montana Eastern Railway Company, and Farmers Grain and Shipping Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 10th day of February, Nineteen Hundred and Twenty, pursuant to an appeal, filed in the clerk's office of the District Court of the United States, District of North Dakota, wherein George Wallace,

Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall are appellants, and Walker D. Hines, Director General of Railroads, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee and Saint Paul Railway Company, Minneapolis, Saint Paul and Sault Sainte Marie Railway Company, Montana Eastern Railway Company, and Farmers Grain and Shipping Company are respondents, to show cause, if any there be, why the order in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the United States, this 6th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty.

CHARLES F. AMIDON,
Judge.

131 [Endorsed:] District Court of U. S., Dist. of North Dakota. Walker D. Hines, Director General of Railroads, et al., Plaintiffs, vs. George Wallace, Obert A. Olson, Carl R. Kositzky, William Langer and Thomas Hall, Defendants. Appeal. Due and personal service is hereby admitted of the within notice of appeal. C. W. Bunn, Attorney for Plaintiffs. Jan. 7, 1920.

132 UNITED STATES OF AMERICA,
District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the District Court of the United States, for the District of North Dakota, do hereby certify that the foregoing pages, from 1 to 131 contain true and faithful transcripts of all those portions of the pleadings, process and proceedings of record and on file in my office as said Clerk designated by the appellant and appellee, and the whole thereof, and the endorsements thereon, in the case of "Walker D. Hines, et al., complainants, versus George Wallace et al., Defendants."

Witness my hand and the seal of said District Court at Fargo, this 17th day of January, A. D. 1920.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk.

By E. R. STEELE,
Deputy.

Endorsed on cover: File No. 27,438. North Dakota D. C. U. S. Term No. 683. George Wallace, Obert A. Olson, Carl R. Kositzky et al., appellants, vs. Walker D. Hines, Director General of Railroads, Northern Pacific Railway Company et al. Filed January 22d, 1920. File No. 27,438.

133 In the Supreme Court of the United States, October Term, 1919.

No. 683.

GEORGE WALLACE et al., Appellants,

vs.

WALKER D. HINES, Director General of Railroads, et al.

Stipulation.

It is agreed that in printing the record in this Court the Clerk may omit printing the exhibits attached to the bill of complaint.

CHARLES W. BUNN,
For Appellees.
FRANK E. PACKARD.
For Appellants.

134 [Endorsed:] File No. 27,438. Supreme Court U. S., October Term, 1919. Term No. 683. George Wallace et al., Appellants, vs. Walker D. Hines, Director General of Railroads, et al. Stipulation to omit parts of record in printing. Filed January 31, 1920.

JAN 22 1920
JAMES D. MAHER,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 683

GEORGE WALLACE, OBERT A. OLSON, CARL R. KOSITZKY, WILLIAM LANGER and THOMAS HALL,

Appellants.

vs.

WALKER D. HINES, Director General of Railroads, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, MINNEAPOLIS, SAINT PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, MONTANA EASTERN RAILWAY COMPANY, and FARMERS' GRAIN AND SHIPPING COMPANY.

MOTION TO ADVANCE.

Come now the appellants and respondents and jointly move to advance the above entitled cause and to set it for hearing at an early date. For grounds of this motion they show:

This is an appeal from the District Court of the United States for the District of North Dakota to review an interlocutory injunction granted on the seventeenth day of December, 1919, by a court of three judges pursuant to section 266 Judicial Code, restraining collection of a certain tax assessed by George Wallace, Tax Commissioner, against the several Railway Companies, respondents. The appellants are state officers having to do with collection of said tax. Walker D. Hines is the Director General of Railroads and during the year for which said tax was imposed was operating the railroad properties of the respondent railway corporations under the authority of the President of the United States, conferred by sundry acts of Congress.

The tax was levied under the provisions of an act of the legislature of North Dakota commonly known as House Bill No. 47, approved March 7, 1919, which imposes "a special excise tax with respect to the carrying on or doing business in the state." The claim of merits as well as the ground of jurisdiction in the bill is, that said act of the legislature and said assessment thereunder impose a tax on the properties of the several respondent railway companies outside the state, in violation of the Fourteenth Amendment to the Constitution of the United States, and also a tax on commerce among the states and with foreign nations, in violation of Section 8, Article 1 of the Constitution of the United States.

The case is one involving revenue of the State of North Dakota and is one in which the United States are concerned, because by the act of Congress of March 21, 1918, the United States are under obligation to pay said tax or protect the Railway Companies therefrom, if valid. The case therefore is one of great public interest, and also one entitled to precedence un-

der Section 266 of the Judicial Code, and on these grounds the parties move that it be advanced and heard promptly.

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Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 683.

GEORGE WALLACE, OBERT A. OLSEN, CARL R. KOSITZKY ET AL., APPELLANTS,

vs.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS; NORTHERN PACIFIC RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

BRIEF OF APPELLANTS.

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Attorneys for Appellants.

INDEX.

	Page.
(1) Statement of the case	1
(2) The statute	4
(3) Argument	5
(4) Appellants have a plain, adequate, and complete remedy at law	5
(5) The corporate appellees are subject to the tax, although not operating their own railway systems	9
(6) Can the State tax the privilege of doing local business unless it gives the corporation the right to withdraw from local business	9
(7) The law is not invalid since it levies a tax on the basis of a mileage proportion of a unit value of stocks and bonds. It imposes a tax upon property within the State, although the major portion of it may be devoted to interstate commerce	12
(8) Distribution of unit value upon a single-track mileage basis, with certain qualifications, has been uniformly recognized by Federal courts as eminently fair	19
(9) Land grants	26
(10) Mileage basis of distribution equitable in North Dakota	27
(11) The measure of the tax is the total assets of the corporation	29
(12) Stocks and bonds owned by carriers are assets within the terms of the statute	30
(13) Conclusion	30
(14) Excessive valuation	31
(15) An alternative construction	33

Cases Cited.

	Page.
Bailey vs. Clark, 88 U. S., 284	29
Baltic Mining Co. vs. Massachusetts, 231 U. S., 68; 58 L. Ed., 127	14
Bank vs. Treat, 128 Fed., 262	29
Bismarck Water Supply Co. vs. Barnes, 30 N. D., 555; 153 N. W., 454	7
Buzzard vs. Houston, 119 U. S., 347; 30 L. Ed., 451	5
Chicago, Burlington & Quincy Ry. Co. vs. Babcock, 204 U. S., 585; 51 L. Ed., 636	6
Commercial Cable Co. vs. Morgan, 178 N. Y., 433	29
Cooley on Taxation, 3d ed., 2d vol., p. 1485	7
Dows vs. Chicago, 11 Wall., 108; 20 L. Ed., 65	6
Fargo vs. Hart, 193 U. S., 490; 48 L. Ed., 761	21, 22
Green vs. Louisville & Interurban Railroad Co., 244 U. S., 555	29
Greene vs. The Louisville & Interurban Ry. Co., 244 U. S., 673	6
Ind. Mfg. Co. vs. Koehne, 188 U. S., 681; 47 L. Ed., 651	6
Looney vs. Crane Co., 245 U. S., 178	15
Louisville & N. R. Co. vs. Bosworth, 209 Fed., 380, 422	20
Louisville-Nashville R. R. Co. vs. Greene, 244 U. S., 522	20, 23
Milwaukee Ry. Co. vs. Cass Co., 8 N. D., 18; 76 N. W., 239	7
New York Guaranty Co. vs. Memphis Water Works Co., 107 U. S., 205; 27 L. Ed., 484	5
Pittsburg, C. C. C. & D., L. R. R. Co. vs. Backus, 154 U. S., 421; 38 L. Ed., 1031	20, 22
Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481; 57 L. Ed., 1288	6
Soo Ry. Co. vs. Dickey Co., 11 N. D., 107; 90 N. W., 260	7
State vs. Mutual Life Ins. Co., 175 Ind., 59; 93 N. E., 213; 42 L. R. A. (N. S.), 256, and note thereto	9
State Railroad Tax Case, 92 U. S., 608; 43 L. Ed., 663	20, 24, 25, 29
St. Louis S. W. Ry. Co. vs. Arkansas, 235 U. S., 350	10
St. Louis S. W. Ry. Co. vs. Arkansas, 235 U. S., 350	13
Western Union Telegraph Co. vs. Kansas, 216 U. S., 1; 54 L. Ed., 355	12

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

BRIEF OF APPELLANTS.

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(1) Statement of the Case.

This is a suit brought by Walker D. Hines, Director General of Railroads; the Northern Pacific Railway Company, the Great Northern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, the Montana Eastern Railway Company and the Farmers' Grain & Shipping Company, all railway corporations owning and operat-

ing lines of railway into or through the State of North Dakota and engaged in interstate commerce, against George E. Wallace, State Tax Commissioner; Obert A. Olson, State Treasurer; Carl R. Kositzky, State Auditor; William Langer, Attorney General; and Thomas Hall, Secretary of State, all officials of the State of North Dakota, to restrain the collection of a certain tax of fifty cents on each one thousand dollars, imposed upon the stocks and bonds of corporate appellees, and to restrain Thomas Hall, Secretary of State, from cancelling the registration of corporate appellees. This tax is imposed under the provisions of chapter 222 of the Laws of North Dakota for 1919 upon the right of said railway companies to do business in North Dakota. The law is applicable alike to corporations organized under the laws of the State of North Dakota and corporations organized under the laws of other States and foreign countries. In the case of the latter class of corporations it is provided that the investment in North Dakota shall be ascertained upon the basis of business done within and without the State, and if this is not the more easily ascertainable, then upon the property employed within and without the State, except in the case of railroads and certain other public-service corporations, in which case North Dakota's portion is to be ascertained upon a main-line mileage basis.

Appellees charge, in substance, that the law has the effect of taxing property beyond the jurisdiction of the State; that it imposes a burden upon interstate commerce; it discriminates against their property, since it is already assessed under the general property tax laws of the State at its full and true value; that the tax commissioner in arriving at North Dakota's share of the stocks and bonds of the appellee railway systems, failed to deduct bonds secured by mortgages upon property lying wholly without the State of North Dakota; that he failed to deduct expensive terminals, yards, and property lying wholly without the State; that he failed to take into consideration the more expensive tracks and

roadbeds in mountainous regions; that he misconstrued the law in apportioning their investments in stocks and bonds upon main-track mileage basis in that he should have taken into consideration, in addition to the main track, passing tracks, spurs, sidings and all trackage, or that he should have distributed such investments upon the basis of the total business done both within and without the State, and if that was not more easily ascertained, then upon the property owned both within and without the State; that their property within the State of North Dakota is now and has been for some time assessed under the general property tax at its full value, and that the imposition of this tax is an added burden upon their property, not borne by other property in the State; that the net result of the main-line mileage method of distribution, the alleged discrimination between appellees' property and other property, the failure to take into account terminals, yards, property and the more expensive roadbed in mountainous regions, and the failure to deduct bonds secured by mortgages upon property outside of the State, is to make the act violative of the due process and equal protection clauses of the Constitution, and impose a burden upon commerce, and repugnant to section 8 of article 1 of the Constitution of the United States and section 1 of the Fourteenth Amendment to the Constitution of the United States.

Upon filing their bill of complaint, appellees moved the court for a temporary injunction pending the determination of the action, restraining appellants and each of them from the enforcement of the tax or the cancellation of corporate charters (T. of R., p. 21). At that time it was agreed between complainants and the State that the argument in respect to a temporary injunction should be had at St. Louis (T. of R., p. 32).

After due notice the motion for a temporary injunction was argued before the proper tribunal in St. Louis and a temporary restraining order issued restraining the appellants and each of them from making any attempt to collect

the tax in question and restraining Thomas Hall, Secretary of State, from cancelling the corporate registration of any of the appellee corporations (T. of R., p. 34).

The case comes here upon appeal from the order granting the temporary injunction (T. of R., p. 38).

(2) The Statute.

The particular provisions of the statute in question are as follows (Subd. 2, sec. 1 of chapter 222, Laws of North Dakota for 1919):

> "Every corporation, joint-stock company or association, now or hereafter organized under the laws of any other State, the United States or a foreign country, and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to fifty cents for each one thousand dollars of the capital actually invested in the transaction of business in the State; provided, that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that

proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the State shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the tax commissioner all the information necessary to its computation."

(3) ARGUMENT.

Appellants Have a Plain, Adequate and Complete Remedy at Law.

It is elementary that a United States court of equity will not intervene to restrain the collection of an illegal tax if there is an adequate and speedy remedy at law. Section 723, Revised Code, provides:

> "Suits in equity will not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Although the statute only declares what has always been the common law, as was said in New York Guaranty Company *vs.* Memphis Water Works Company, 107 U. S., 205; 27 L. ed., 484:

> "It must at least have been intended to emphasize the rule and to impress it upon the attention of the courts."

See also Buzzard *vs.* Houston, 119 U. S., 347; 30 L. ed., 451.

Where fraud exists or illegality in a tax levy, equity may be resorted to for redress, except where a legal remedy, which is adequate and complete, has been substituted by statute for the remedy in equity. Courts primarily are not concerned with the causes of the invalidity of a tax—such invalidity may be due to fraud, illegality, or unconstitutionality. Whatever the causes, it can do no more than to make the tax invalid, and that alone is not sufficient ground for equitable jurisdiction.

Ind. Mfg. Co. *vs.* Koehne, 188 U. S., 681; 47 L. ed., 651.

Chicago, Burlington & Quincy Ry. Co. *vs.* Babcock, 204 U. S., 585; 51 L. ed., 636.

Singer Sewing Machine Co. *vs.* Benedict, 229 U. S., 481; 57 L. ed., 1288.

It has been contended that whenever any equitable circumstance such as fraud, cloud upon title, or multiplicity of suits arises, that equitable jurisdiction is warranted and that an injunction will issue to restrain the collection of the tax. This doubtless is the rule in the absence of a statute providing an adequate remedy at law, but from the decision in the case of Dowe *vs.* Chicago, 11 Wall., 108; 20 L. ed., 65, to Green *vs.* The Louisville & Interurban Ry. Co., 244 U. S., 673, recently decided, the Supreme Court of the United States has declared with increasing emphasis that no relief can be given in a Federal court of equity against the collection of a tax, no matter how invalid nor from what source the invalidity arises, so long as there exists an adequate and complete remedy at law.

It was to remove clouds from titles that the chancery courts, and, subsequently, courts of equity, assumed jurisdiction and issued injunctions to restrain the collection of invalid taxes. Under the common law if the property owner removed the cloud by paying the tax he had no remedy by

which he could recover his money, as such payment was considered voluntary, and money so paid could not be recovered and the only way in which equity could be afforded was by the issuance of an injunction.

It is well settled that an injunction will not issue to restrain the collection of a personal property tax, except in unusual cases where irreparable injury will result, unless the collection of the tax be enjoined by a suit in equity.

> Cooley on Taxation, 3d ed., 2d vol., p. 1485.

Section 2244, Compiled Laws of the State of North Dakota, 1913, after describing how the assessed value of railroad property shall be apportioned to the various political subdivisions of the State, provides:

> "And the same shall be taxed as personal property is taxed in each county."

The Supreme Court of North Dakota has held that for purposes of taxation, the franchise, roadway, roadbeds, rails, and rolling stock of a railroad is personal property.

> Soo Ry. Co. *vs.* Dickey Co., 11 N. D., 107; 90 N. W., 260.
>
> Milwaukee Ry. Co. *vs.* Cass Co., 8 N. D., 18; 76 N. W., 239.
>
> Bismarck Water Supply Co. *vs.* Barnes, 30 N. D., 555; 153 N. W., 454.

It is the contention of appellants in the case at bar that corporate appellees have an adequate, complete remedy at law in sections 8175 and 8177, Compiled Laws of North Dakota, which provides—

(Section 8175:)

> "An action respecting the title to property, or arising upon contract may be brought in the district court against the State the same as against a private person.

> When such actions are not of a local nature they shall be brought in the County of Burleigh. The plaintiff at the time of commencing such action shall file an undertaking with sufficient surety to be approved by the clerk of court to the effect that he will pay any judgment for costs that may be rendered against him."

(Section 8177:)

> "No execution shall issue against the State on any judgment, but whenever a final judgment against the State shall have been obtained in any action the clerk shall make and furnish to the State auditor a duly certified copy of such judgment and the auditor shall in due course draw his warrant upon the State treasurer for such amount and deliver the same to the person entitled thereto."

Although both express contracts and contracts implied in fact are based on consent, there exists yet another kind of contract known as *quasi* contracts or contracts implied in law. It is not strictly true that all contracts depend upon the consent of the parties thereto; courts presume that where a duty is imposed and consideration involved, consent must exist. It is true that consent and promise in such contracts are purely fictitious and were implied under the common law to fit the cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. The duty to perform is implied from the consideration, and for unjust enrichment an action will lie.

The payment to a public official of an invalid tax does not sound in tort, but can be recovered upon contract. In sections 8175 and 8177 the State of North Dakota has consented to be sued upon contract. The enrichment of the State by the payment of an invalid tax to a State official implies the consent of the State to the contract, with the promise to refund the invalid tax.

Appellee, by paying these taxes of which they complain,

may by a single action at law test their validity and recover back any money in payment so far as invalid.

State *ex.* Mutual Life Ins. Co., 175 Ind., 59; 93 N. E., 213, 42 L. R. A. (N. S.), 256, and note thereto.

(4) The corporate appellees are subject to the tax, although not operating their own railway systems.

It is alleged in the bill of complaint that chapter 222 was copied from the acts of Congress to similar effect; that these acts of Congress had been, before the adoption of chapter 222, construed not to impose a tax upon corporations which had ceased to perform the functions for which they were chartered and incorporated; and specifically that railroad corporations which had leased their railroads to other operators and were receiving compensation in the way of rental were not subject to the tax imposed with respect to doing business by the corporation; that in adopting these acts of Congress the legislature adopted the construction placed thereon by the Federal rail administration and that therefore they were exempt from this tax.

While it is true that a State adopting a statute of another State is deemed to have adopted its construction by the court of the State of its origin, yet, even this rule is not conclusive, and courts often refuse to adopt such construction. In the instant case the rule is not applicable for two reasons: (1) The adoption, if there was an adoption, was by a State from a Federal statute, and (2) the main construction of the acts of Congress was not by a court, but by an administrative official.

(5) Can the State tax the privilege of doing local business unless it gives the corporation the right to withdraw from local business?

It is further contended that the State cannot tax the privilege of doing local business unless it gives the corporation the

right to withdraw from such local or intrastate business. It is true that the State may not hinder or impede commerce between the States and it is so conceded here. It is also true that the act itself declares:

> "When any such tax shall have been delinquent for ninety days * * * in the case of foreign corporations, on a certificate of the Tax Commissioner that such tax has been due for ninety days and remains unpaid, the Secretary of State shall cancel the registration of such corporation and notify it that all of its privileges under the laws of the State are suspended until such tax, together with all penalties provided in this act, has been paid."

The Supreme Court of the United States in St. Louis S. W. Ry. Co. *vs.* Arkansas, 235 U. S., 350, had a similar question before it. By section 20 of act 112 of the Laws of 1911 of the State of Kansas it was enacted:

> "In case any corporation shall fail to pay the franchise tax prescribed by this act when it becomes due during the term of said certificate, the said Tax Commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in this act."

As the court pointed out in construing the later statute, if the necessary construction of this language was to forbid a common carrier from engaging in interstate business as well as intrastate business that it must of necessity be in conflict with the commerce clause of the Constitution.

The court took the position, however, that as the act had not yet been construed by the State court it was proper for the Federal courts to wait until the State court had adopted a construction, rather than assume in advance that such a construction would render it repugnant to the Federal Constitution. The court examined the statute to see if it so clearly

required a forfeiture of interstate franchises for non-payment of the tax that it was reasonable to presume that the State court would put such a construction upon it. The court did not indulge in the presumption either that the legislature intended to exceed the limits imposed upon State action by the Federal Constitution or that the courts of the State would construe the legislation to that end. The rule was applied that if a statute will bear two constructions, one within and the other beyond the constitutional power of a law-making body, the courts must adopt that which is consistent with its constitutionality, as the presumption prevails that the legislature intended to act within the scope of its authority.

The discussion of the Arkansas case by Mr. Justice Pitney is so applicable to the case at bar that that great jurist might well have been discussing it. He said:

> "It does not seem to us that section 20, when taken in connection with the context, requires to be so construed as to interfere with interstate commerce. The taxing provisions of the act apply to all corporations doing business in the State for profit, whether organized under its laws, or under the laws of other States, or of foreign countries, and entirely irrespective of the question whether they are engaged in commerce. Therefore it was natural that, in such a provision as is contained in section 20, language having upon its face a general scope should be adopted; but it need not be indiscriminately applied to all the several kinds of corporations that are subject to the act. The forfeiture in terms is of 'the right of such corporation to do business in this State.' This does not necessarily include the right to transact business that is done partly within and partly without the State. The section does not call for an annulment of the charter. That topic is covered by section 15 of the same act, which applies, however, only to corporations organized under the laws of Arkansas or of foreign countries, and not to corporations of other States, to which class plaintiff in error belongs.
>
> "In view of all these considerations, we ought to assume, until the State, through its judicial or admin-

istrative officers, places a different construction upon the act, that section 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or also that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the act. Under either view it is obvious, from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce."

(6) The law is not invalid, since it levies a tax on the basis of mileage proportion of a unit of stocks and bonds. It imposes a tax upon property within the State, although the major portion of it may be devoted to interstate commerce.

Many efforts have been made by States to levy a tax upon foreign corporations, that is, corporations organized in other States or foreign countries, for the privilege or right to be or exist as a corporation and to exercise such corporate rights or privileges within the State. Such corporate right or privilege, although a matter of value to the stockholders of a corporation, is not an asset of the corporation and transferable as such, and its value cannot be ascertained for the purpose of taxation as property. But since it is a privilege or right granted by the State, an excise tax may be imposed upon it for the purpose of raising revenue. The leading case is that of the Western Union Telegraph Co. *vs. Kansas*, 216 U. S., 1. An attempt was made by the Legislature of Kansas to levy such an excise tax upon the corporate rights and privileges and the right to exercise them within the State, measured by all of the authorized capital stock of the corporation. The tax imposed was one-tenth of one per cent upon the first one hundred thousand dollars of the capital stock of foreign corporations, and one-twentieth of one per cent upon the next four hundred thousand dollars and two hundred dollars for each million or major part thereof above five

hundred thousand dollars. This act was declared unconstitutional by this court in a well-considered opinion:

> "* * * as having the effect not simply to exert the lawful power of State control of legal business within the State, but to burden interstate commerce and to reach property represented by the capital stock of the companies which was duly paid in and invested in property in many States; therefore, beyond the taxing jurisdiction of Kansas."

The legislature of Arkansas, evidently with the decision in the Kansas case before it, attempted to frame an act which would conform to the principles announced in that case. It was provided that a tax of one-twentieth of one per cent (identical in amount with the tax levied by the statute under consideration) upon that portion of the stocks of a foreign corporation measured by the unit system and pro-rated to the State in that portion which the property of the corporation used in its business within the State bore to its total property used in its business both within and without the State.

In St. Louis S. W. Ry. *vs.* Arkansas, 235 U. S., 350, this court sustained this act. The construction placed upon the act by the Supreme Court of Arkansas was accepted, that it imposed an annual franchise tax upon the right to exist as a corporation and to exercise corporate powers within the State. The amount of the tax being measured solely by the property of the corporation within the State and used in business transacted therein and not an imposition upon or interference with interstate commerce. The court assumed that it was the intent of the act to tax only the foreign corporation upon its franchise to do intrastate business. No difficulty was encountered upon the ground that it taxed receipts based upon the earnings of interstate carriers. It was not repugnant to the due process clause on the ground of the tax being in effect upon property beyond the limits of the

State. It was not found to be a double tax and was sustained in the following language:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a ligitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property percentage (one-twentieth of one per cent) of 'The proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State,' and the act provides machinery for ascertaining the market value of the entire capital stock and striking a proportion between the value of the property owned and used by it outside of the State. In its essence the tax is not distinguishable from that which was sustained by this court in Western Union Tel. Co. *vs.* Massachusetts, 125 U. S., 530, and in another case between the same parties, 141 U. S., 40. See also Pittsburgh Ry. *vs.* Backus, 154 U. S. 421, 430, 435; Indianapolis, &c., Ry. *vs.* Backus, 154 U. S., 438; Cleveland, &c., Ry. *vs.* Backus, 143 U. S., 439, 444, 445; Western Union Telegraph Co. *vs.* Taggart, 163 U. S., 1, 18; Western Union Tel. Co. *vs.* Gottlieb, 190 U. S., 412, 424."

The next landmark in this line of decisions is that of the Baltic Mining Company *vs.* Massachusetts, 231 U. S., 68.

The Massachusetts legislature in 1909 imposed an excise tax upon the authorized capital stock of foreign corporations of one-fiftieth of one per cent, the tax upon any single corporation being limited to $2,000.00. In construing this statute this court again reviewed its previous decisions and reconciled them and laid down this rule:

> "Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."

In reply to the contention that it was in effect a tax upon property without the State and upon property engaged in interstate commerce, the court said:

> "So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

In the case at bar, we have an excise tax levied upon appellee's right to exist and be a corporation and to exercise corporate privileges within the State of North Dakota, measured by property, some of which may not be subject to a property tax within the State. It is not a tax upon property but a tax upon the peculiar franchise right which is not an asset of the corporate entity and may not as such be transferred or assigned, but is the right which attaches to the shares of stock and cannot be reached by the ordinary franchise tax. The legislature has seen fit to measure this tax by certain properties of appellee, and the fact that some of these properties may be used beyond the boundaries of the State or may not be taxed as such by the State, under the authority of the Baltic Mining Company decision this does not invalidate the tax nor make it repugnant to the "commerce" and "due process" clauses.

In 1917 this court rendered another notable decision in Looney *vs.* Crane Company, 245 U. S., 178. The suit arose out of an act of the legislature of Texas taxing foreign corporations. The act imposed a series of complicated fees and taxes upon foreign corporations for the privilege of transacting business within the State. The Crane Company was chartered under the laws of Illinois and had its principal place of business in Chicago, and was engaged in the manu-

facture and sale of hardware, railway supplies, building materials, agricultural implements, etc., not only in Illinois, but in other States. Merchandise was shipped on orders obtained through the solicitation of its agents and sent to Chicago for execution or orders sent to Chicago through the mail. The company had established agencies in other States to which goods were shipped from Chicago for distribution in the same manner as they were distributed from the central offices.

The excise tax was levied upon both domestic and foreign corporations and in part, at least, was measured by the capital stock issued and outstanding plus surplus and undivided profits, in cases where they exceeded the authorized capital stock.

The Crane Company's authorized capital stock was $17,000,000.00; the surplus and undivided profits amounted to $8,139,000, and its taxable property in Texas was $301,175,000; its total gross receipts amounted to $39,831,000.00, of which only $1,019,750.00 was derived from business transacted in Texas. A large portion of this State revenue was from interstate business. The corporation paid a general tax upon its property in the State. The excise tax levied for 1913 was $17,040.00.

The court conceded that while—

> "It is also clear * * * that both the permit tax and franchise tax exerted a power which the State undoubtedly possessed, that is the authority to control the doing of business within the State by a foreign corporation, and the right to tax the intrastate business of such corporation carried on as a result of permission to come in."

That the problem of reconciling this undoubted right with the limitations placed upon the State's control of interstate commerce by the United States Constitution must be solved in favor of the supremacy of the Constitution of the United States, and held that this right must be exercised by the State

without conflict with Federal limitations. Following the decision in the Western Union Telegraph Co. *vs.* Kansas, *supra*, and similar cases, the court held the act unconstitutional but reconciled its decision with the decision in the Baltic Mining Company case, the Arkansas case and other cases in which the court had held the tax not to be a burden upon commerce or repugnant to the due process clause of the Fourteenth Amendment. In reconciling these cases the court said:

> "In the second place, in making the inquiry stated in all the cases, the compatibility of the statutes with the constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. *These conditions relate to the subject-matter upon which the tax was levied, or to the amount of tax in other respects paid by the corporation, or limitations of the amount of the tax authorized where a much larger amount would have been due upon the basis upon which the tax was apparently levied.*"

In March, 1919, this court again had before it the question of an excise tax upon the privilege accorded to foreign corporations by States of exercising their corporate right within their boundaries. This case is notable because it held unconstitutional the amended Massachusetts act which was favorably construed in the Baltic Mining Company case. However, the Massachusetts Legislature had removed the tax limit and had placed an added burden upon corporations having a capital stock of more than $10,000,000.00. It will be recalled that the original tax held constitutional in the Baltic Mining Company case was one-fiftieth of one per cent upon authorized capital stock, limited to $2,000.00 upon any one corporation. The legislature amended this law removing the $2,000.00 limitation and placing an added tax of one-hundredth of one per cent upon all authorized capital stock in excess of $10,000,000.00. The act was held un-

constitutional upon the ground that it was a burden upon commerce and repugnant to the "due-process" clause in that it taxed property beyond the boundaries of the State.

Here again the court reviewed its former decisions and reconciled them. The decision in the Western Union Telegraph Company *vs.* Kansas, *supra*, the Arkansas decision, the Baltic Mining Company decision, and the Looney Company decision were all reconciled and it appears to be the final decision of the court *that the entire capital stock or entire assets of the corporation, may be used as the measure of an excise tax upon a foreign corporation for the privilege of exercising its corporate rights within a State so long as the tax is limited in amount and such limitation is fixed below the point where it becomes a burden upon interstate commerce; also that such privilege tax may be measured by all of the property of the corporation within the State engaged in business, although a large portion of it may be engaged in interstate commerce. In other words, a limitation upon the tax so that it does not become a burden upon interstate commerce, must be imposed where the entire capital stock or assets of the company are used as the measure of the tax but no limitation need be placed upon a tax measured by all of its property within the State regardless of its use.* It would appear in the latter case that there is no repugnancy to the "commerce clause" or the "due-process clause" even though the tax may be discriminatory and unconstitutional upon other grounds. There is no repugnancy to the commerce clause unless a burden is added to interstate commerce which is not borne by the intrastate commerce. In brief, there must be an actual burden upon interstate commerce which acts as a hindrance or places it at a disadvantage as compared with intrastate commerce. That the tax may be excessive and discriminatory as between this class of corporations and some other class of corporations or between this class of corporations and business and property in general does not make it repugnant to the commerce clause. On the other

hand, the "due-process" clause is not violated unless the tax actually burdens property beyond the jurisdiction of the sovereignty. The property itself lying beyond the boundaries of the State must be subjected to a tax in order to be repugnant to the due-process clause. *That the legislature has seen fit to make the measure of the privilege tax property lying beyond the boundaries of the State does not affect the "due-process" clause.*

(7) Distribution of unit value upon a single-track mileage basis, with certain qualifications, has been uniformly recognized by Federal courts as eminently fair.

It is contended by appellee that the distribution of the unit value of stocks and bonds upon a single-track mileage basis has the effect of taxing property beyond the jurisdiction of the State. It is alleged that it does not fairly or equitably distribute values and that the taxes upon stocks and bonds so distributed burdens property lying wholly without the State.

The question of the proper distribution among the several States of railroad, telegraph, telephone or express system values has been frequently before the Federal courts. The decisions cover both the organic and physical systems. The unit valuation has been universally accepted and the courts have held that such parts thereof can be valued as part of the whole, or in other words, that it is not essential that it be valued without reference to the whole as if the fraction thereof were itself the whole. Such assessment does not involve the assessment by the State of property lying outside of its jurisdiction. It is also considered fair and equitable for the State to avail itself of the enhancement in value of other parts of the system, occasioned by the transaction of business resulting from the entire unit. It is well settled that ordinarily, that is, in the absence of certain circumstances, such part thereof can and should be valued on the mileage basis.

As was said by Judge Cochrane of the Eastern District of Kentucky in Louisville & N. R. Co. *vs.* Bosworth, 209 Fed., 380, 422:

> "It is an exceptional case where the part is not to be so valued. In any given case, nothing else appearing than the value of the whole and the proportionate mileage of the part, the value of the part is to be taken as the same portion of the value of the whole."

This decision was approved by this court in Louisville-Nashville R. R. Co. *vs.* Green, 244 U. S., 522.

Mr. Justice Miller, in the State Railroad Tax case, 92 U. S., 608; 43 L. Ed., 663, where the apportionment involved was between subordinate jurisdictions of the same State, said:

> "It may well be doubted whether any better method of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole."

Mr. Justice Brewer said in the Pittsburg, C., C., C. & D., L. R. R. Co. *vs.* Backus, 154 U. S., 421; 38 L. Ed., 1021:

> "It is ordinarily true that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole railroad. This mode of division has been recognized by the court several times as eminently fair."

In answer to the contention that a given portion of a railroad system is measured by the fair value of its component parts and that such unit is not entitled to a portion of the greater value of other parts occasioned by the operation of the road as a system was answered by Mr. Justice Brewer in the same case, in the following language:

> "The true value of a line of railroad is something more than an aggregate of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage forms its portion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. There is something which does not exist, and cannot exist, until the combination is formed."

To the same effect is Fargo *vs.* Hart, 193 U. S., 490; 48 L. Ed., 761, where Mr. Justice Holmes thus summarizes the rule:

> "So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable, but it is recognized in the cases that if, for instance, a railroad company had terminals in the State equal in value to all the rest of the line through another, the latter State could not make use of the unit of the road and equalize the value of their mileage."

Admitting this to be the rule it may not be presumed, in the absence of positive proof, that the valuation arrived at by a mileage basis of distribution has the necessary result of taxing property beyond the jurisdiction of the sovereignty through an inequitable and unjust distribution of values. It must be presumed that the special tribunal, that is, the State Tax Commissioner, has taken into consideration all of the factors in the problem and arrived at a legal valuation. It takes positive and convincing evidence to the contrary to overcome this presumption and to justify a court in declaring the valuation illegally determined. This is all the more

true when, as in the case at bar, the legislative assembly has by a solemn legislative act declared this to be the method of distribution. It must be presumed that both the legislature and the tax commissioner made the legal deductions and gave proper consideration to more valuable trackage outside of the State, to terminals and other properties, which the State could not presume to apportion in their entirety to North Dakota.

As was said by Mr. Justice Brewer in the Backus case above cited:

> "Whenever a question of fact is thus submitted to the determination of a special tribunal its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than so found and determined. Here the question determined by the State board was the value of certain property. That determination cannot be overthrown by testimony of two or three witnesses that the valuation was other than that fixed by the board."

Mr. Justice Holmes, in the Fargo case, discussing the same question, said:

> "Of course, if the board did not go beyond its jurisdiction, its decision was final."

The question naturally arises, is the distribution provided by chapter 222 unconstitutional and has it the necessary effect of making the tax levied thereunder invalid, or is it a legal method, which if properly administered by the tax commissioner, will result in a legal tax? I am inclined to the latter view. While it must be conceded from an economic viewpoint that main-line mileage distribution is not the most desirable, yet it has been recognized universally in this country as a proper method of distributing taxable valuations among the political subdivisions of the States, and to a

very large extent for the distribution of assessable property among the States themselves.

Many of the questions raised here were considered in Louisville & Nashville Railroad Company vs. Green, *supra*. In that case the unit value of the franchise of the Louisville railroad was ascertained by the process of capitalization at six per cent of its net earnings and a deduction made therefrom of its taxable physical property and the remainder was taken as the franchise value and distributed on a mileage basis. As the court said (p. 538):

> "The sum so apportioned was 35.15 per cent * * *. The percentage which it took was the percentage which the mileage operated by plaintiff in Kentucky on its own account was to entire mileage so operated by it. The entire mileage so operated by it was 4,478.61 of which 1,574.41 was in Kentucky."

Here is a direct sanction by this court of the distribution of franchise value upon a mileage basis. This case, and its companion cases, Green *vs.* Louisville & Interurban Railroad Co., 244 U. S., 499, and Illinois Central Railroad Company *vs.* Green, 244 U. S., 555, deal exhaustively with the entire question of unit valuation for purposes of assessment and with methods of distribution. The court in that case laid down the rule that while the tribunal charged with the assessment of property of a common carrier, valuing it as a unit and distributing it to the State in which it operates, need not adopt the most approved methods, but may not adopt methods which are clearly illegal; although gross earnings, all track mileage, or property basis of distribution were economically preferable to main-track mileage distribution, if the official or tribunal elected to use main-track mileage, the assessment and tax for that reason would not be illegal and void.

In the Louisville Railroad case (p. 536) the court said:

> "The findings of an official body, such as the board of valuation and assessment—as was the case here—

> made, after a hearing and upon notice to the tax board, are *quasi* judicial in their character, and are not to be set aside and disregarded by the court unless it is made to appear that the body proceeded upon an erroneous principle, or adopted an improper mode of estimating the value of the franchise, or unless fraud appears. Pittsburg, etc., R. R. Co. *vs.* Backus, 154 U. S., 421, 436; Chicago, Burlington & Quincy Ry. Co. *vs.* Babcock, 204 U. S., 585, 596."

The court then reviewed the method adopted by the Kentucky State board and, although the distribution was upon a mileage basis, and while the court expressed some doubt as to the desirability of the method adopted both as to valuation and distribution, yet they sustained its action in both.

The court also approved the 6 per cent capitalization:

> "*There was evidence that these non-taxable securities amounted to upwards of thirty million in value, whereas, the capitalization at six per cent of their income produced a value of only $14,469,113.* In our opinion it is sufficient answer to this contention to say that the board merely carried out the capitalization or income plan of valuation, perhaps to its logical extreme, *certainly not in the manner that enables this court to say that they pursued a fundamentally wrong method.*"

It was also contended in the Kentucky case that the board wrongfully took into consideration only the mileage operated by the roads, whereas it should have included the controlled mileage within and without the State, which would have yielded to Kentucky a much smaller portion of the entire system. This contention was sustained by the district court and was approved by the Supreme Court, in the following language:

> "In this the district court yielded to plaintiff's contention, and we think rightly so."

And finally, appellees contended that since the apportionment must be upon the basis, not of the operated mileage only, but of all mileage operated and controlled within and without the State, that it led to the further conclusion, as a corollary, that from the valuation of the total capital stock should be deducted an item that the board had overlooked, viz., the value of so much of the controlled mileage as was not represented by plaintiffs' holdings. Since in adopting the capitalization-of-income method of valuation no account was taken of the interests of others than plaintiff in the controlled roads, it was contended that the statute did not justify such procedure and that such property was beyond the power of the State, because it resulted in taxing property not belonging to the plaintiff. The court said (p. 551):

> "The matter is not free from doubt, but we concur in the view of the district court that it was the legislative intent that, in fixing the percentage apportionable to Kentucky and to be taken into consideration in valuing the taxable franchises, the whole of the controlled mileage within and without the State *was to be treated as a part of the aggregate capital stock, not only in fixing the mileage, but also in fixing the valuation upon which the apportionment is to be based.*"

Again the court said in this connection (p. 548):

> "It is settled that total stock or total assets, situate partly within and partly without the State, but organically related, may be taken into consideration as a means of reaching the true cash value of property within the State, and that the mileage relation may be given its proper weight. State Railroad Tax Cases, 92 U. S., 575, 608; Pullman's Palace Car Co. *vs.* Pennsylvania, 141 U. S., 18, 26; Pittsburg, &c., Railway Company *vs.* Backus, 154 U. S., 421, 430-431; Western Union Telegraph Co. *vs.* Taggart, 163 U. S., 1, 26, 27; Fargo *vs.* Hart, 193 U. S., 490, 499."

(8) Land Grants.

It is alleged that the main-track mileage does not properly distribute bonds secured upon the land grants of the railroads. That in North Dakota, for instance, the Northern Pacific only retains 980 acres of their original land grant, which was valued by them in 1917 at $14,963.06, while their total remaining land grant for their entire system was valued that year at $35,700,726.00. The answer to this is obvious. In 1864 Congress granted to the original corporation more than forty million acres of land, being a certain number of sections in each township throughout a strip of territory of uniform width on each side of the track throughout its entire length. This was a uniform distribution of land in proportion to main-track mileage. To be sure, the percentage of sidings and the percentage of branch lines to main line today may be greater in some States than in others, but, roughly speaking, in the beginning the distribution was uniform throughout the system. That the corporation may have sold practically all of its land in North Dakota and devoted the proceeds therefrom to the building and improving of its property or to purchasing stocks and bonds of other corporations or to acquiring other non-railroad property ought not to preclude the State from taxing an equitable portion of the resulting assets. Since land has been retained in other States because it could not be sold, or because of mineral rights, or for other reasons it was not deemed policy to sell it, it does not follow that that State should be accredited, in a unit valuation for a stock and bonds excise tax, with its entire valuation, while the State of North Dakota, whose land has been sold and a large portion of the proceeds invested outside of its boundaries, allowed no portion of such valuation.

(9) Mileage Basis of Distribution Equitable in North Dakota.

Appellees point out that the main-track mileage ratio of distribution for the Northern Pacific, for instance, is 25.07 per cent; that North Dakota's share of the interstate gross earnings, plus its intrastate gross earnings, are but 16.25 per cent of the system's gross earnings; train-miles in North Dakota are but 17.7 per cent of all its train-miles; that the locomotive-miles are 15.3 per cent of the total locomotive-miles; that the freight-train car-miles were 16.9 per cent of the total freight-train car-miles, and that all car-miles within the State were 16.95 per cent of all car-miles.

I would respectfully call the attention of the court to the peculiar location of North Dakota with relation to its terminal markets and distributing centers. The ratios above enumerated have been arrived at by distribution upon a mile-haul basis. North Dakota is almost altogether an agricultural State. Its chief product is wheat, of which it produced normally more than one hundred million bushels and occasionally as high as one hundred and fifty million bushels annually. It produces a great deal of other small grains and livestock for the markets, besides being to a considerable extent engaged in the business of dairying. Practically all of the grain is marketed in Duluth and Minneapolis, while its livestock market is south St. Paul or Chicago. A very large percentage of all its cream and butter is shipped to the Twin Cities. A very large percentage of everything we produce crosses Minnesota for final marketing. On the other hand, outside of farm machinery we have no great distributing centers in the State. Practically everything is shipped from wholesalers and jobbers in Duluth, St. Paul, Minneapolis, and Chicago. Even with farm machinery and the distributing done within the State the great primary points of distribution are Duluth, the Twin Cities, Chicago, or eastern manufacturing centers.

The last census located the center of population of the State considerably north and somewhat west of Jamestown. Jamestown lies approximately one hundred miles from the eastern boundary of the State, on the main line of the Northern Pacific. The western part of the State is semi-arid and is not as productive and in a business way is not comparable with the eastern half of the State. It is probable that the business center of the State, both as to production and consumption, is on the line running north and south about one hundred miles west of the Red River. This means that all of our products travel approximately 100 miles in North Dakota and from 250 to 325 miles in Minnesota before being finally marketed. On the other hand, practically everything we consume is shipped the same distance in Minnesota and the 100 miles into North Dakota.

The distribution of gross earnings, train, engine and the car-mileage above quoted is upon the basis of the mile-haul. That is, if a car of wheat is shipped from a point somewhat west of Devils Lake on the Great Northern to Minneapolis it travels approximately 100 miles in North Dakota and somewhat more than 300 miles in Minnesota. In distributing the earnings from that car and in distributing the engine mileage and the freight-car mileage, etc., the railroad company accredits one-fourth to North Dakota and three-fourths to Minnesota. The obvious result is that of the business originating in North Dakota the State gets one-fourth of the gross earnings, car-mileage, track-mileage, etc., while Minnesota gets three-fourths. Any distribution of values upon gross earnings works a great injustice to North Dakota.

It will be pointed out by plaintiffs that North Dakota gets its share of the through hauls. This is true. So does Minnesota. So do Montana and all other States traversed by the main lines. Minnesota gets approximately 325 miles on the Great Northern to the Twin Cities and to Duluth perhaps 270 miles, while on the Northern Pacific the mileage to

Duluth is perhaps 300 miles and to St. Paul and Minneapolis 250 miles. North Dakota has 377 miles of the main line of the Northern Pacific and approximately the same mileage of the Great Northern. Montana has 780 miles of the main line of the Northern Pacific, yet our population is much greater than that of Montana, and the business originating and terminating within the State must be greater. Our branch lines, as compared with Montana, would indicate that as to initial business, both going and coming, we are a greater asset to the railroad.

For these reasons, among others, the legislature doubtless made an exception in the distribution of values upon a mileage basis as to common carriers, knowing that the mile-haul method of distribution worked an injustice to the State of North Dakota and the mileage basis as being more equitable under all the circumstances.

(10) The measure of the tax is the total asset of the corporation.

It is too elementary to need argument that the "fair value of stocks and bonds" by which the excise tax is to be measured under this statute can have no other meaning than the total assets of the corporation. That is, the tax is not levied upon the physical or market value of the railway property but is measured by the assets of the corporation. In the light of this self-evident fact, the contention that bonds which are not general in their nature and are not secured upon physical property of the corporation generally, but which are secured by a certain part of the system which lies outside the borders of the State of North Dakota, falls of its own weight.

Bailey *vs.* Clark, 88 U. S., 284.
Commercial Cable Co. *vs.* Morgan, 178 N. Y., 433.
Bank *vs.* Treat, 128 Fed., 262.

In view of the decision in the Louisville case, that the unit of the system included not only subsidiary but all controlled

corporations, the provisions of the statute in controversy can have no other meaning than that all the assets and all the factors which go to make up a great transportation system must be taken into account by the State when attempting to arrive at the State's proportion of that unit for purposes of taxation. It cannot be contended that because the Northern Pacific Railway Company happens to have a mortgage upon a division in Minnesota that that mortgage is not to be taken into consideration in arriving at the mortgage indebtedness of the system. It is as fallacious as to contend that a division, because it might be owned by a subsidiary corporation all of the stocks of which was owned by the Northern Pacific Railway Company, did not form part of its system.

(11) Stocks and bonds owned by carriers are assets within the terms of the statute.

Equally without merit is the contention that stock in other corporations and other property owned by the railway corporations should not be taken into consideration in arriving at the total value of their stocks and bonds. The State of North Dakota has contributed its proportionate share of the accumulated wealth which has purchased these bonds. If the Northern Pacific Railway Company accumulated a reserve of $100,000,000 and invested it in the common stock of the Burlington or in an iron mine or in mineral rights, it is absurd to contend that such an asset should be deducted from the total assets of the company before any apportionment is made of the total value of the company's assets to any State because, perchance, such investments lie beyond the borders of the State.

(12) Conclusion.

The logical conclusion from the foregoing is that the tax complained of by corporate plaintiffs is an excise tax, measured by all of their assets in North Dakota, including in-

tangible as well as tangible assets. No complaint is made that the total value of the stocks and bonds of the several transportation companies is too great or that the mileage ratio is too large. Then it must be shown that the tax commissioner adopted a fundamentally wrong principle in distributing the stock and bond values upon a mileage basis. The rule of law in the cases heretofore cited is unquestioned—a mileage distribution is as fair and equitable as can be arrived at unless it is specifically shown that there is gross inequality in the value of different portions of the system. This is especially true in levying an excise tax. If the method adopted is a generally accepted rule, then the exceptions which make it illegal must be established by those who complain. No showing has been made as to the value of the terminals located outside of North Dakota or as to the greater value of certain mileage caused by expensive construction in the mountains. The court then must presume that the State official clothed with quasi-judicial powers must have taken into account all of the legal factors in reaching his valuation of the stocks and bonds as a unit and in making the proper deductions before distributing the same to North Dakota. That he has not done this we admit is subject to proof, but until it is proven an injunction ought not to lie to restrain the collection of this tax. Such allegations are quite as subject to proof here, by means of proper affidavits and allegations, as elsewhere.

(13) Excessive Valuation.

It is alleged that the valuation of the stocks and bonds of these carriers is much greater than any valuation placed upon their properties within the State for the purpose of general property taxation. Plaintiffs appear to conclude that because the State board of equalization places a certain valuation upon their property in the State that such valuation, even in the absence of proof, must be presumed by the court

to be the true value and the value fixed by the tax commissioner of the State presumed to be an improper value. This court may not indulge in any such presumption. The court is not now considering the railroad tax cases of North Dakota, so-called, but the instant case, and the presumption must be in favor of the legal valuation of the stocks and bonds by the State tax commissioner.

However, there are certain factors to be taken into consideration in arriving at the value of the stocks and bonds which do not enter into a valuation of railroad operating property which is the subject of valuation for the ordinary purposes of property taxation. For instance, as has been heretofore stated, railroad operating property is considered personal property for purposes of taxation in North Dakota. Real estate, other than that used exclusively for railroad purposes, industrial locations on rights of way, land grants, mineral rights, stocks and bonds in corporate treasuries are not then considered, because otherwise taxed, in arriving at valuations for purposes of property taxation. On the other hand, the State here is attempting to levy an excise tax upon these corporations for the right of exercising corporate powers, rights and privileges within the State, and they are attempting to measure it by the actual value of these stocks and bonds. The fair value of stocks and bonds rests upon and must embrace all of property, including land grants, mineral rights, real and personal property not used exclusively for railroad operation, and stocks and bonds, other than those of its subsidiary or controlled corporations, carried in its treasury.

When the value of this so-called non-operating property has been deducted from the actual value of stocks and bonds, I have no doubt that there will be no discrepancy between the remainder and the valuation of operating property in North Dakota as fixed by the State board for purposes of property taxation. In fact, a computation based upon the allegations of the bill, so far as any particular road is concerned, makes it quite apparent that there is no very great

discrepancy in the valuation of this class of property by the State board of equalization, and the same element of value considered by the tax commissioner in arriving at his value of the stocks and bonds.

(14) An Alternative Construction.

If, however, the court finds that the distribution of the admitted value of the stocks and bonds of the plaintiffs is improperly made upon a main-track mileage basis, then I would respectfully point out a possible alternate construction of the statute. Subdivision 2 of section 1 of House bill 47 (chap. 222 of the Laws of North Dakota for 1919), so far as pertinent, provides:

> "* * * that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business with the State bears to its total business within and without the State and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, and the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State."

My impression is that the construction adopted by the State tax commissioner, namely, that a corporation engaged in business partly within and partly without the State,

except transportation companies, is entitled to have its ascertained stock and bond value distributed to the State upon a business or gross earnings basis, and if that is not more easily ascertained, then upon the amount of property, both within and without the State, but that the provision for the distribution of the values of common carriers upon a mileage basis is all exclusive, and excludes any election on the part of the tax commissioner to distribute their values upon any other basis.

Another construction, and one which has met with the sanction of able attorneys, is that the method of distribution of railroad property may be elected by the tax commissioner and that he must select their gross earnings as the method of distribution, but if this is not the more easily ascertainable, then he may select the property basis of distribution or the mileage basis of distribution. This would permit the commissioner to distribute the ascertained stock and bond values upon a gross earnings or business basis, which would be the difference, roughly, between 16 and 23 per cent, and if this was not more easily ascertainable, then upon a property basis, which would be even more advantageous to the roads.

It is a well-settled rule of law that of two constructions, one of which will make the statute unconstitutional and the other will admit of its constitutionality, that it is the duty of the court to adopt the construction which will destroy the repugnancy to the constitution.

Respectfully submitted,

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INDEX.

	Page.
STATEMENT OF THE CASE	1–2
STATUTE INVOLVED	2–3
STATEMENT OF FACTS	4–9
QUESTIONS INVOLVED	9
ARGUMENT	10–17
I. This is a proper case for the exercise of equity jurisdiction	10–12
II. The statute in question is invalid since it taxes property outside of the State of North Dakota, and constitutes an undue burden on interstate commerce	12–17
CONCLUSION	17

STATUTES CITED.

C. 231, 36 Stat. 1081, 1162	2
C. 418, 39 Stat. 645	4
C. 25, 40 Stat. 451	4–5
Art. II, sec. 179, Constitution of North Dakota	12
Sec. 142, Constitution of North Dakota	17
Sec. 8175, Compiled laws of North Dakota	11
Sec. 8177, Compiled laws of North Dakota	11
C. 222, Laws of North Dakota, 1919	2, 6, 10, 11, 19
Sec. 4635, North Dakota Civil Code	17
Sec. 4710, North Dakota Civil Code	17
Sec. 4715, North Dakota Civil Code	17

CASES CITED.

Allen v. *Pullman Palace Car Co.*, 191 U. S. 171	17
Atchison, Topeka, & Santa Fe v. *O'Connor*, 223 U. S. 280	11–16
Delaware, Lackawanna & Western v. *Pennsylvania*, 198 U. S. 341	16
Fargo v. *Hart*, 193 U. S. 490	12–14–15
Gaar Scott v. *Shannon*, 223 U. S. 468	11
International Paper Co. v. *Mass.*, 246 U. S. 135	16
Locomobile Co. v. *Mass.*, 246 U. S. 146	16
Looney v. *Crane*, 245 U. S. 178	16
Ludwig v. *Western Union*, 216 U. S. 146	16
Meyer v. *Wells Fargo & Co.*, 223 U. S. 298	12, 16
Ohio River & Western Ry. Co. v. *Ditty*, 232 U. S. 576	10
Pullman Co. v. *Adams*, 189 U. S. 420	17
Pullman Co. v. *Kansas*, 216 U. S. 56	16
Shaffer v. *Carter*, No. 531, October term, 1919	10
Union Tank Line v. *Wright*, 249 U. S. 275	16
Western Union v. *Kansas*, 216 U. S. 1	12, 15

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

GEORGE WALLACE, OBERT A. OLSEN, Carl R. Kositsky, et al., appellants,
v.
WALKER D. HINES, DIRECTOR GENERAL of Railroads, Northern Pacific Railway Company, et al.
No. 683.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

BRIEF FOR WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, APPELLEE.

STATEMENT OF THE CASE.

Appellees instituted this suit in the District Court of the United States for the District of North Dakota, to enjoin appellants, who are officers of the State of North Dakota, duly qualified and acting as such, from collecting certain taxes assessed and levied against the corporate appellees, under the provisions of the act of North Dakota, entitled, "An act to provide for defraying the general expenses of the State government, by imposing a tax on the shares of stock and the bond issue of corporations organized

or doing business in the State, and repealing all acts and parts of acts in conflict therewith" (Chap. 222, Laws of North Dakota for 1919), hereafter referred to as "North Dakota Tax Act, 1919," a copy of which act is hereto attached as Exhibit "A" and made a part of this brief.

After hearing, a temporary injunction was granted by Judges Sanborn, Munger, and Faris, pursuant to the provisions of section 266 of the Judicial Code (C. 231, 36 Stat. 1087, 1162) (R. 35).

An appeal was taken direct to this court by appellants from the order granting the temporary injunction.

STATUTE INVOLVED.

The pertinent provisions of the North Dakota Tax Act, 1919, which imposes "a special excise tax with respect to the carrying on or doing business in the State," are as follows:

> (2) Every corporation, joint stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint stock company or association, equivalent to 50 cents for each $1000.00 of the capital actually invested in the transaction of business in the state; provided, (that in the case of a corporation engaged in business partly within and partly without the state, invest-

ment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state). The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital invested during the preceding calendar year; provided that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint stock company or association furnish to the Tax Commissioner all the information necessary to its computation. (Subd. 2, sec. 1, C. 222, Laws of North Dakota for 1919.)

STATEMENT OF FACTS.

The defendants in the court below filed no defenses and introduced no evidence, so the facts as stated in the bill must be taken as true. They are as follows:

The Director General of Railroads, at the time of the institution of this suit, was operating the properties of the Northern Pacific Railway Company, the Great Northern Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the Montana Eastern Railway Company, and the Farmers' Grain & Shipping Company, under authority of the Federal control act, approved March 21, 1918 (C. 25, 40 Stat. 451), and the act approved August 29, 1916 (C. 418, 39 Stat. 645).

By proclamation of the President of the United States, dated March 29, 1918, W. G. McAdoo, Director General of Railroads, or his successor in office, was authorized and empowered to execute contracts covering the operation by the United States of railroads or systems of transportation, and providing for compensation for the use thereof. Pursuant to this authority, contracts have been made with all the aforesaid companies, except the Farmers' Grain and Shipping Company.

The Federal control act provides in part as follows:

> Every such agreement shall provide that any Federal taxes under the act of October third, nineteen hundred and seventeen, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the

> period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation. (C. 25, 40 Stat. 451, 452.)

The contracts entered into between the Director General of Railroads and the several appellee carriers, contain the following provisions with reference to the payment of taxes:

> The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the company harmless from all taxes

lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the company harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

Under paragraph 2, section 1, of the North Dakota tax act, 1919, every foreign corporation, joint-stock company, or association, "engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company, or association, equivalent to fifty cents for each thousand dollars of the capital actually invested in the transaction of business in the State," and that "in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire capital stock and bond issues which its business within the State bears to its total business within and without the State." An exemption of $10,000 from the amount of capital invested in the State is allowed under certain circumstances. The

provision, however, as to railroad, telegraph, and like companies, having lines within and without the State, defines "property within the State" to mean "that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State."

Before the passage of this act, all property and franchises of the corporate appellees in North Dakota were assessed and taxed under other statutes of the State on the basis of their supposed full value, which in the case of the properties of the Northern Pacific, Great Northern, Minneapolis, St. Paul and Sault Ste. Marie, and Farmers' Grain and Shipping Company is now being contested as being more than the real value thereof based upon the actual valuation, which has been made. (R. 5, 6.)

The assessment under the North Dakota Tax Act, 1919, was arrived at by the defendant, George Wallace, tax commissioner, in the following manner: He ascertained what, in his opinion, was the fair average value of the capital stock and bonds of the particular carrier for the calendar year 1918 and computed the ratio of its North Dakota business to its total business. He determined this ratio to be the ratio which the carrier's operated mileage in North Dakota bore to its total operated mileage. He then applied this ratio to the valuation of the stocks and bonds as determined by him, after deducting the legal exemption of $10,000, and the result obtained was the computed value of

the carrier's "property within the State," subject to the excise tax. (R. 7, 10, 13, 14.)

This method of computing the value of property within the State of North Dakota does not take into consideration the following facts, which appellees insist render the tax unfair and unconstitutional.

(*a*) The valuation fixed by the tax commissioner exceeds the fair value of the property within the State. (R. 9, 12, 14, 16.)

(*b*) The ratio adopted by the tax commissioner in determining the amount of business done within the State greatly exceeds the ratio of the net operating revenues of the companies in the State of North Dakota to their entire net operating revenues. (R. 9, 12, 14, 16.)

(*c*) No allowance is made for difference in cost of construction of main line and branch line mileage. A large proportion of the mileage within the State of North Dakota is branch line mileage. (R. 8, 10, 13, 15.)

(*d*) No allowance is made for difference in physical conditions in North Dakota as compared with those in the other States in which these roads operate. Most of the roads operate through a mountainous country where the cost of construction is very high compared with that in a State of plains and prairies with no mountains, such as North Dakota. (R. 8, 10, 13, 15.)

(*e*) There are comparatively few large terminals within the State of North Dakota, the value of the terminals within the State being very low compared

with that in the other States in which the roads operate. (R. 8, 11, 13, 15.)

(*f*) There are included in the values fixed by the State tax commissioner, bonds representing investments in affiliated companies which have no properties within the State of North Dakota, and in bonds of the companies which are only liens on property not located within the State. (R. 8, 9, 11, 13, 14, 15.)

(*g*) In the cases of the Great Northern and Northern Pacific Railways, there are included in the total value of the properties of the companies, Northern Pacific and Great Northern joint collateral trust bonds, valued at $203,114,174, which were liens on certain shares of the capital stock of the Chicago, Burlington & Quincy R. R. Co., which has no property within the State of North Dakota. (R. 9, 11.)

(*h*) There is included in the properties owned by the Northern Pacific Railway Company, land grants, lands, and outstanding contracts covering land grants, which are valued at over $50,000,000. Only a negligible portion of the acreage and value of the lands of the company being in North Dakota. (R. 8.)

QUESTIONS INVOLVED.

(I) This is a proper case for the exercise of Equity jurisdiction.

(II) The statute in question is invalid since it taxes property outside of the State of North Dakota and constitutes an undue burden on interstate commerce.

ARGUMENT.

I.

This is a proper case for the exercise of Equity jurisdiction.

Under section 4 of the North Dakota Tax Act, 1919, the excise tax imposed is made a first lien on all property within the State, and takes precedence over all other liens. Adopting, in this case, the language of Mr. Justice Pitney "the right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of the appellants from the cloud of which they sought to free it by the bringing of these actions." (*Ohio River and Western Railway Company* v. *Ditty*, 232 U. S. 576, 587.) See also *Shaffer* v. *Carter*, No. 531 Oct. Term, 1919, U. S. Supreme Court; decided Mar. 1, 1920.

This section also provides for a penalty of 10 per cent, which accrues upon nonpayment at the time the tax is due, and provides for a penalty of 1 per cent for each month thereafter while the tax remains unpaid, and, further, that, upon failure to pay the tax, proceedings shall be taken by the Attorney General to collect the tax and penalties by sale of the corporate properties or otherwise. The Secretary of State after a delinquency of 90 days is required to cancel the registry of the corporations, suspending their privilege to do business under the laws of North Dakota, until the tax is paid. Payments made under such conditions would not be voluntary but would be made under duress and to avoid irreparable injury.

Equity jurisdiction was, therefore, properly invoked. (*A. T. & S. F.* v. *O'Connor*, 223 U. S. 280; *Gaar Scott* v. *Shannon*, 223 U. S. 468, 471.)

By the terms of section 5 of the act all moneys collected under its provisions are to be paid into the State treasury and used for defraying the general expenses of the State government. It is the view of the appellees that there is no statute of North Dakota authorizing suits to be brought against it for the recovery of taxes illegally exacted. It is conceded that there is no express statutory provision authorizing such suit, though it is contended by appellants that, by inplication, sections 8175 and 8177 of the Compiled Laws of North Dakota afford an adequate and complete remedy at law.

Section 8175 provides that "an action respecting the title to property, or arising upon contract may be brought in a district court against the State the same as against a private person."

Section 8177 forbids the issuance of any execution against the State, but provides that "whenever a final judgment against the State shall have been obtained in any action the clerk shall make and furnish to the State auditor a duly certified copy of such judgment and the auditor shall in due course draw his warrant upon the State treasurer for such amount and deliver the same to the person entitled thereto."

Appellees insist that suits for the recovery of taxes paid under the North Dakota Tax Act, 1919, would not arise out of contract, either express or implied,

and, therefore, would not come within the provisions of section 8175. Not only the right to recover must be clear, but also the remedy provided must be complete and adequate, which is not the case here.

II.

The statute in question is invalid since it taxes property outside of the State of North Dakota, and constitutes an undue burden on interstate commerce.

Article II, section 179, of the Constitution of North Dakota provides that "the franchises, roadway, roadbed, rails, and rolling stock" of all railroads shall be taxed at their full value. Under this provision of the constitution the State board has assessed at its full value the franchises, roadway, roadbed, rails, and rolling stock of each of the corporations involved. Since the franchises and property of the railroads doing business in North Dakota are taxed on the basis of their full value under another act, the tax in question can not be sustained as a property tax. (*Meyer* v. *Wells Fargo & Co.*, 223 U. S., 298, 301.)

Since the tax in question is an excise tax it is invalid, under the decisions of this court, if it operates, as it does in this case, to tax property out of the State, or to tax the privilege of doing business among the States or the property devoted to interstate commerce. (*Fargo* v. *Hart*, 193 U. S., 490; *Western Union* v. *Kansas*, 216 U. S., 1.)

As indicative of the effect of the act in question upon appellee carriers, as construed by the State

authorities having the duty of enforcing the act, attention is called to the typical results of the assessment made on the property of the Northern Pacific Railway Co.

The assessment was made by applying to the average value of the capital stock and bonds of the company the ratio 23.07 per cent, which was the ratio of the operated mileage of the Northern Pacific Railway Company in the State of North Dakota, to its total operated mileage. No allowance was made for the fact that over 75 per cent of the operated mileage in North Dakota was branch line; nor for the difference in value and costs of branch line and main line mileage; nor was consideration given to the fact that the Company during the year 1918 owned, in addition to lands granted by Congress worth over $50,000,000 and situated, with negligible exceptions, entirely without the State of North Dakota, securities valued at $178,000,000, representing investments in property located in other States. No consideration was given to the difference in costs of construction on account of the difference in character of the country traversed, nor was any allowance made on account of expensive yards or terminals, located outside of North Dakota, although it appeared that the company has few expensive yards or terminals in the State of North Dakota. Much of the mileage of the company is constructed through mountainous country, where the cost of construction is exceedingly high, while the mileage in North Dakota is over plains and prairies, with no mountains, and the cost of construction of

the mileage in North Dakota is low as compared with the cost of construction in other States in which the company does business. The assessment included bonds issued or assumed amounting to $117,990,881, none of which were liens on property in North Dakota or represented any investment or property within that State. (R. 7, 8, 9, 10.)

For the convenience of the court, tabulated statements have been prepared and are attached hereto as Exhibits "B," "C," "D," "E," "F," "G," and "H," showing in brief form the principal facts alleged in the bill with respect to each of the several carriers, which manifest the invalidity of the tax and the unfairness of the method and values used by the State officials in computing it, and show that the imposition of the tax would constitute a burden on interstate commerce.

In view of the above facts, appellees contend that the decision of this case is controlled by the principles laid down by this court in *Fargo* v. *Hart*, 193 U. S. 490, and other cases. In *Fargo* v. *Hart*, this court held that a property tax assessed on a mileage basis could not be sustained, because the State authorities in assessing the tax took into account the value of valuable property situated outside of the State. In the course of its opinion the court said:

> It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. *So long as it fairly may be as-*

> *sumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile.* That would be taxing property outside of the State under a pretense. (*Fargo* v. *Hart*, 193 U. S. 490, 499.) (Italics ours.)

In the case of *Western Union Telegraph Company* v. *Kansas*, the court, speaking through Mr. Justice Harlan, said:

> Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State. (*Western Union Telegraph Co* v. *Kansas*, 216 U. S. 1.)

The same principle has been followed by this court in the cases of *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Meyer* v. *Wells Fargo Company*, 223 U S. 298; *International Paper Co.* v. *Mass.*, 246 U. S. 135; *Locomobile Co. of America* v. *Mass.*, 246 U. S.

146; *Looney* v. *Crane*, 245 U. S. 178; *Ludwig* v. *Western Union Telegraph Co.* 216 U. S. 146; *Delaware, Lackawanna & Western R. R.* v. *Pa.*, 198 U. S. 341; and in the recent case of *Union Tank Line* v. *Wright*, 249 U. S. 275, 283. In the case last cited, the court said in construing a statute which provided that property taxes on nonresident car lines were to be on the basis of the proportion that the mileage operated within the State bore to the total mileage operated by the company:

> In the present case, the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all States. *Real values—the essential aim—of property within a State can not be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto.* * * * * * * We think plaintiff in error's property *was appraised according to an arbitrary method* which produced results wholly unreasonable and that to permit enforcement of the proposed tax *would deprive it of property without due process of law and also unduly burden interstate commerce.* (*Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 283.) Italics ours.

Under these decisions, it is clear, we submit, that the North Dakota Tax Act, 1919, as construed and applied by appellants with respect to the appellee carriers, is invalid and unconstitutional because the method of appraising their properties was arbitrary

and the enforcement thereof would deprive them of their property without due process of law and would unduly burden interstate commerce.

Under the provisions of section 142 of the constitution of North Dakota, and sections 4635, 4710, and 4715 of the North Dakota Civil Code, carriers doing business within the State are placed under legislative control. They are obliged to furnish suitable facilities for the conduct of intrastate business and are not at liberty to withdraw therefrom. Since the company is not free to renounce the privilege of doing intrastate business, the tax in question is invalid because it would be in effect a privilege tax upon interstate business. (*Pullman Company* v. *Adams*, 189 U. S. 420, and *Allen* v. *Pullman Palace Car Company*, 191 U. S. 171.)

CONCLUSION.

The court below, sitting in equity, had jurisdiction of the cause and its decree granting the injunction prayed for should be affirmed.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
E. MARVIN UNDERWOOD,
For the Director General of Railroads.

D. F. LYONS,
M. L. COUNTRYMAN,
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ALEXANDER KOPLIN,
Of Counsel.

EXHIBIT "A."

AN ACT To provide for defraying the general expenses of the State government, by imposing a tax on the shares of stock and the bond issues of corporations organized or doing business in the State, and repealing all Acts and parts of Acts in conflict herewith.

Be it enacted by the Legislative Assembly of the State of North Dakota:

SECTION 1. On and after January first, 1919, taxes shall be and hereby are imposed annually as follows:

(1) Every corporation, joint-stock company or association, now or hereafter organized in the State for profit and having a capital stock represented by shares or issuing bonds, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint stock company, or association during the previous calendar year, equivalent to 50 cents for each $1000 of the fair value of its capital stock or bonds issued; and in estimating the value of capital stock, the surplus and undivided profits of such corporation, joint-stock company or association shall be included. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock and bonds for the preceding year; provided, that for the purpose of this tax an exemption of $10,000.00 shall be allowed from the capital stock of any such corporation, joint-stock company or association.

(2) Every corporation, joint-stock company or association, now or hereafter organized under

the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power, or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar

year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

SECTION 2. There shall not be taxed under this Act any—

(1) Labor, agricultural, or horticultural organization;

(2) Mutual savings bank not having a capital stock represented by shares;

(3) Fraternal beneficiary society, order or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefit—to the members of such society, order, or association, or other dependents;

(4) Domestic insurance company or building or loan association or co-operative bank, organized and operated for mutual purposes and without profit;

(5) Cemetery company owned and operated exclusively for the benefit of its members;

(6) Corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

(7) Business League, Chamber of Commerce, or Board of Trade, not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

(8) Civic league or organization not organized for profit, but operated exclusively for the promotion of general welfare;

(9) Club organized and operated for pleasure, recreation or other non-profitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

(10) Farmers' or other mutual hail, cyclone, crop or fire insurance company, mutual or cooperative telephone or like organization of a purely local character, the income of which consists wholly of assessments, dues or fees collected from members for the sole purpose of meeting its expenses;

(11) Farmers' mutual warehouse, elevator, creamery, packing or canning company or like organization; farmers' or like association organized and operated as a sales agent for the purpose of marketing the products of its members, or any other organization having a membership and not conducted for profit, but for the service of its members or the public;

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this Act;

(13) Federal Land Bank or National Farm Loan Association, as provided in Section 26 of the Act of Congress approved July 17th, 1916, entitled An Act to provide capital for agricultural developments, to create standard forms of investment based upon farm mortgages, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government deposi-

tories and financial agents for the United States, and for other purposes;

(14) Corporation owned and operated by the State.

SECTION 3. Every corporation, joint-stock company or association subject to the tax herein imposed, shall, on or before the first day of August, 1919, and on or before the first day of March each year thereafter, make a report to the State Tax Commissioner, which shall include the following:

(1) The name of the corporation, joint-stock company or association, the place where incorporated, the date of incorporation and the purpose for which incorporated;

(2) The names and addresses of the President or Vice-President, Secretary, Treasurer and the General Manager or chief representative in the State, or, if no representative in the State, then the General Manager or chief representative elsewhere;

(3) The principal place of business in the State, or if no place of business in the State the chief place of business outside of the State;

(4) The number of shares of stock issued, the number subscribed and paid up and the par and actual or market value of the same, and all issues of stock during the previous calendar year;

(5) All bond issues previous to the date of making return, and all bond issues during the previous calendar year.

Such return shall be sworn to by the president, Vice President or other principal officer, and by the Treasurer or Assistant Treasurer, and may be made to the Commissioner, or to his authorized agent in the district in which is located the principal office of the corporation, joint-stock company or associa-

tion. Such report shall be made in the form and manner prescribed by the Commissioner, who shall furnish to each corporation, joint-stock company or association coming within the provisions of this Act all necessary forms and blanks upon which to make the return; provided, that such blanks and forms shall be insofar as practicable, similar to those prescribed by Congress for making returns to the United States Commissioner of Internal Revenue for the purposes of the federal tax on corporations, joint stock companies and associations; provided, further, that every such corporation, joint-stock company or association shall file with the State Tax Commissioner a duplicate of the return made by it to the United States Commissioner of Internal Revenue, and shall in addition furnish to the Commissioner all other information required by this Act, and all information reasonably necessary to enable the Commissioner to carry out its provisions.

SECTION 4. The tax herein imposed shall be assessed by the State Tax Commissioner, on or before the fifteenth day of August, 1919, and on or before the first day of August of each year thereafter, who shall certify the amount of such tax in each case to the State Auditor; and within twenty days thereafter the Auditor shall make his draft upon such corporation, joint-stock company or association for the amount of the tax due as certified, and shall present the same to the State Treasurer for collection. Within twenty days thereafter the State Treasurer shall make demand for the payment of such warrant; and if any such corporation, joint-stock company or association shall fail to pay the same within thirty days after such demand, a penalty of 10 % thereof shall immediately accrue,

and thereafter 1 % for each month after the tax becomes delinquent, while the same remains unpaid. Such tax being delinquent and unpaid shall be a first lien upon all and singular the property, estates and effects of such corporation, joint-stock company or association within the State, and shall take precedence over all other demands and judgments against the same; and the certificate of the Tax Commissioner that such tax is due, and the unpaid draft of the State Auditor issued in pursuance thereof, shall be sufficient warrant for the Attorney General to institute proceedings for the collection of said tax and penalty by the sale of said property or otherwise; and the Attorney General shall enter such proceedings on the certification of the State Auditor that such tax is due and unpaid 30 days after demand for payment has been made as herein provided. Such penalty shall be added to the tax and shall be demanded and paid in the same manner as provided for the tax itself. When any such tax shall have been delinquent for ninety days it shall, in the case of a North Dakota corporation, constitute sufficient ground for the annullment of the existence of such corporation in an action instituted by the Attorney General for that purpose, and in the case of a foreign corporation, on the certificate of the Tax Commissioner that such tax has been due for ninety days and remains unpaid, the Secretary of the State shall cancel the registration of such corporation and notify it that all of its privileges under the laws of the State are suspended until such tax, together with all penalties provided in this Act, has been paid.

SECTION 5. All moneys collected under the provisions of this Act shall be paid into the State Treas-

ury to be used for the defraying of the general expenses of the State Government.

SECTION 6. All administrative, special and general provisions of law, including the general tax laws of the State, insofar as consistent with the provisions of this Act, are hereby extended and made applicable to all the provisions herein contained.

SECTION 7. If any clause, sentence, paragraph or part of this Act, shall for any reason be declared invalid by a court of competent jurisdiction, such judgment shall not impair or invalidate any other clause, sentence, paragraph or part thereof, but any such part shall be of full effect and validity, as if no such decision had been rendered.

SECTION 8. All Acts and parts of Acts in conflict with this Act are hereby repealed.

Approved March 7, 1919.

EXHIBIT B.

Details of assessment and amount of tax under North Dakota tax act, 1919.

	Northern Pacific Railway.	Great Northern Railway and Montana Eastern.	Chicago, Milwaukee, and St. Paul.	Minneapolis, St. Paul, and Sault Sainte Marie.
Total ~~par~~ average value of capital stock and bonds ~~issued~~ operated	$476,983,969	$377,672,369	$441,558,988	$125,075,100
Ratio of ~~main track~~ mileage in North Dakota to ~~main track~~ mileage of system	23.07 per cent	26.30 per cent	3.68 per cent	41.0 per cent
North Dakota proportion of capital investment based upon above ratio	$110,040,201	$99,327,833	$16,249,370	$51,280,791
Legal exemption	10,000	10,000	10,000	10,000
Taxable value	110,030,201	99,317,833	16,239,370	51,270,791
Amount of tax at rate of 50 cents per $1,000	55,015	49,659	8,120	25,635

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EXHIBIT C.

Value of property in North Dakota, assessed value under other tax laws, and assessed value under North Dakota tax act.

	Northern Pacific Railway.	Great Northern Railway and Montana Eastern.	Chicago, Milwaukee, and St. Paul.	Minneapolis, St. Paul, and Sault Sainte Marie.
Assessed full value property in North Dakota under other tax laws:				
For 1917	$97,000,000	$113,000,000	$17,000,000	$52,000,000
For 1918	90,000,000	104,000,000	16,000,000	48,000,000
Taxable value claimed by carriers based upon actual valuation	81,000,000	94,000,000	.....	42,500,000
Ratio of said actual value in North Dakota total for system as determined by carrier's bureau of valuation	14 per cent	.....	.....	.....
Cost of property in North Dakota to April 1, 1918	.....	63,000,000	.....	.....
Taxable value assessed under North Dakota tax act for 1918	$110,040,201	99,327,833	16,289,370	51,280,791

THIS PAGE B

EXHIBIT D.

Value of bonds issued or assumed, and value of securities owned by the carriers, secured by property not situated in North Dakota.

	Northern Pacific Railway.	Great Northern Railway.	Chicago, Milwaukee and St. Paul.	Minneapolis, St. Paul and Sault Sainte Marie.
Par value of bonds issued or assumed, none of which were liens on property in North Dakota, or represented any investment or property within that State, all of which were included in the capital investments taken as the basis for assessment under North Dakota tax act	$117,990,881	$181,292,996	$51,088,000	$19,313,100
Book value of stocks, bonds, notes, etc., owned by carriers, no part of which was situated in North Dakota or grew out of business done in that State	178,723,000	238,000,000	33,000,000	11,815,000

EXHIBIT E.

Ratio of ~~main track~~ operated mileage in North Dakota to ~~main track~~ operated mileage of system, taken as the basis of apportionment under North Dakota tax act, compared with ratio of business carried in North Dakota to business carried on system as shown by certain factors of operation.

	Northern Pacific Railway.	Great Northern Railway and Montana Eastern.	Chicago, Milwaukee and St. Paul.	Minneapolis, St. Paul and Sault Sainte Marie.
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*
Ratio used under North Dakota tax act	23.07	26.30	3.68	41.00
Ratio of North Dakota business to total for system as shown by—				
Train miles	17.70	19.45	2.38	30.60
Freight train miles	.....	18.53	.....	.....
Locomotive miles	15.30	16.90	1.97	26.78
Freight train car miles	16.90	.....	2.44	25.91
All car miles	16.95	17.75	2.41	26.74
Gross operating revenues	16.25	17.14	2.25	26.42
Net operating revenues	18.20	.....	2.25	21.91

EXHIBIT F.

Ratio of North Dakota local business to total business of system in 1918.

	Northern Pacific Railway.	Great Northern Railway and Montana Eastern.	Chicago, Milwaukee, and St. Paul.	Minneapolis, St. Paul, and Sault Sainte Marie.
Operating revenues from local business in North Dakota	$2,589,103	$2,487,498	$147,607	$1,164,394
Operating revenues in North Dakota from interstate business	14,124,688	14,767,973	2,839,639	4,678,031
Operating revenues of system	102,908,259	100,661,067	132,894,455	22,111,661
Ratio of North Dakota local business to total business	2.50 per cent	2.47 per cent	0.11 per cent	5.26 per cent
Ratio used under North Dakota tax act	23.07 per cent	26.30 per cent	3.68 per cent	41.00 per cent

EXHIBIT G.

Ratio of mileage of all tracks to mileage of ~~main tracks~~ operated road in North Dakota and total for system.

	Northern Pacific Railway.	Chicago, Milwaukee, and St. Paul.	Minneapolis, St. Paul, and Sault Sainte Marie.
Miles of all track per mile of ~~main track~~ operated road:			
For system	1.44	1.46	1.22
For North Dakota	1.26	1.13	1.13

EXHIBIT H.

Farmers' Grain and Shipping Company.

Assessed full valuation on property in North Dakota under other tax laws:	
For 1917	$1,324,000
For 1918	1,229,000
Amount of tax at rate of 50 cents per $1,000, assessed under North Dakota tax act	187
Operating revenues from local business in North Dakota	40,649
Operating revenues from all business	100,116
Per cent of North Dakota local business to total business	40.61 per cent.

○

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1919.

No. 683.

GEORGE WALLACE, OBERT A. OLSON, CARL R. KOSITZKY, WILLIAM LANGER and THOMAS HALL,
Appellants,

vs.

WALKER D. HINES, Director General of Railroads, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE and SAINT PAUL RAILWAY COMPANY, MINNEAPOLIS, SAINT PAUL and SAULT SAINTE MARIE RAILWAY COMPANY, MONTANA EASTERN RAILWAY COMPANY, and FARMERS' GRAIN and SHIPPING COMPANY.

BRIEF FOR RAILWAY COMPANIES, APPELLEES.

CHARLES W. BUNN,
BURTON HANSON,
E. C. LINDLEY,
A. H. BRIGHT.

SUBJECT INDEX.

	Pages.
General statement of the case	1–6
The remedy in equity	6–12
The merits	12–24
Herein:	
Question of state law whether Railway Companies under federal control fall under the act	12
Tax in question can only be sustained as a privilege—not as a property tax	13
Tax in question, because it is fixed with reference to value of whole property inside and outside the state, a tax on property beyond the jurisdiction...	14–21
Taking mileage proportion of total property operates to tax property beyond the jurisdiction.....14–16,	21–24

LIST OF CASES CITED.

Pages.

Allen v. Pullman Palace Car Co., 191 U. S. 171 18

Atchison, etc. R. R. Co. v. O'Connor, 223 U. S. 280 .....7, 14, 19

Basso v. United States, 239 U. S. 602..... 10

Dooley v. United States, 182 U. S. 222.... 10

Fargo v. Hart, 193 U. S. 490 .....21, 22, 23

Garr, Scott & Co. v. Shannon, 223 U. S. 471 7

Greene v. Louisville & Interurban R. Co., 244 U. S. 499 ..... 8, 12

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217 20

International Paper Co. v. Mass., 246 U. S. 135 ..... 14, 20

Illinois Central v. Greene, 244 U. S. 555... 22, 23

Johnson, Treasurer, v. Wells, Fargo & Co., 239 U. S. 234 ..... 8, 11

Kansas City, etc., Ry. v. Stiles, 242 U. S. 111 19

Kansas City, etc. Ry. v. Kansas, 240 U. S. 227 19

Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522 .....8, 22, 23

Locomobile Co. of America v. Mass., 246 U. S. 146 14

Looney v. Crane Co., 245 U. S. 178..... 14, 19
Ludwig v. Western Union Tel. Co., 216 U. S. 146 ..... 8, 14

McCoach, Collector, v. Minehill Railroad, 228 U. S. 295 12

Ohio Tax Cases, 232 U. S. 576..... 7
Oklahoma v. Wells, Fargo & Co., 223 U. S. 298 ..... 13, 22

Pittsburgh, etc. Ry. v. Backus, 154 U. S. 421 21
Pullman Co. v. Kansas, 216 U. S. 56..... 14, 17
Pullman Co. v. Adams, 189 U. S. 420..... 18

Raymond v. Chicago Union Traction Co., 207 U. S. 20 7

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481 8
State Railroad Tax Cases, 92 U. S. 605..... 15

Union Pacific v. Weld County, 247 U. S. 282 8
United States v. Emery, 237 U. S. 28..... 10
United States v. Lynah, 188 U. S. 445..... 10
United States v. Savings Bank, 104 U. S. 728 10
United States v. Kaufman, 96 U. S. 567.... 10
Union Tank Line Co. v Wright, 249 U. S. 275 23

Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 14, 17
Western Union Tel. Co. v. Taggart, 163 U. S. 1 ..... 21, 22

Zonne v. Minneapolis Syndicate, 220 U. S. 187 12

IN THE
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October Term, 1919.

No. 683.

GEORGE WALLACE, OBERT A. OLSON, CARL R. KOSITZKY, WILLIAM LANGER and THOMAS HALL,
Appellants,

vs.

WALKER D. HINES, Director General of Railroads, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE and SAINT PAUL RAILWAY COMPANY, MINNEAPOLIS, SAINT PAUL and SAULT SAINTE MARIE RAILWAY COMPANY, MONTANA EASTERN RAILWAY COMPANY, and FARMERS' GRAIN and SHIPPING COMPANY.

This is an appeal from the District Court of the United States for the District of North Dakota to review an interlocutory injunction ordered (Tr. p.

34) on the seventeenth day of December, 1919, by a court of three judges pursuant to section 266, Judicial Code, restraining collection of a certain tax assessed by George Wallace, Tax Commissioner, against the appellee Railway Companies. The appellants are state officers having to do with collection of the tax (Tr. p. 4). Walker D. Hines is the Director General of Railroads and during the year for which the tax was imposed was operating the railroad properties of the appellee railway corporations, under the authority of the President of the United States conferred by acts of Congress.

The tax was levied under the provisions of an act of the legislature of North Dakota commonly known as House Bill No. 47, approved March 7, 1919, imposing "a special excise tax with respect to the carrying on or doing business in the state." The claim of merits in the bill, as well as the ground of jurisdiction, is, that this act of the legislature and the assessment impose a tax on the properties outside the state belonging to the several railway companies, in violation of the Fourteenth Amendment to the Constitution of the United States, and also a tax on commerce among the states and with foreign nations, in violation of Section 8, Article I of the Constitution of the United States (Tr. pp. 4, 16, 17).

The tax was not one in lieu of property taxes, but, as the bill shows, the properties and franchises of appellee railways are taxed at full value under another law. The amount of the tax enjoined was

$138,839.86; being levied $55,015.10 against the Northern Pacific Railway Company, $49,658.91 against the Great Northern Railway Company, $8,119.68 against the Chicago, Milwaukee & Saint Paul Railway Company, $25,635.39 against the Minneapolis, Saint Paul & Sault Sainte Marie Railway Company, $223.70 against the Montana Eastern Railway Company, and $187.08 against Farmers' Grain & Shipping Company (Tr. pp. 5-7).

The suit was brought by Walker D. Hines, Director General of Railroads, jointly with the appellee railway corporations, praying an injunction to restrain the tax. The record contains no showing by defendants and therefore the facts are to be taken as stated in the bill of complaint (Tr. p. 1 and following).

The tax was levied for the calendar year 1918 under an act of North Dakota (copy of which for convenience is appended to this brief) which lays, for the year 1918 and subsequent years, "a special excise tax with respect to the carrying on or doing business in the state" by corporations, joint stock companies and associations. Such companies doing business partly within North Dakota and in other states as well are treated in par. 2 of Sec. 1. As to them the tax is 50 cents per 1,000 dollars of the capital actually invested in the state; this to mean that proportion of the entire stock and bond issues of the corporation, which its business within the state bears to its total business.

If the section stopped here, it probably would be held to mean the proportion of its entire stock and bond issues equal to the proportion of its *purely local business in North Dakota* to its entire business, and a tax laid on this basis might be valid.

But the section proceeds, "and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state," business within the state shall be held to mean *a proportion of the property employed in such business both within and without the state.* Then follows a proviso that in case of a railroad, telephone, telegraph, car or freight line, express company, or other common carrier, gas, light, power, or heating company having lines entering, extending out of, or across the state, *property within the state* shall be held to mean that proportion of the entire property engaged in such business, which its mileage within the state bears to its entire mileage within and without the state.

The appellee railway corporations (except Farmers' Grain & Shipping Company, whose property is all in North Dakota) are corporations owning systems of railroads extending through several states, lying only partly in North Dakota. The bill contains a general description of these properties (Tr. p. 3), which were instrumentalities both of state and interstate commerce and were being used as such during 1918 by the Director General of Railroads (Tr. pp. 3, 4). The assessments attacked were levied on the mileage ba-

sis stated in the proviso of the legislative act, a mileage proportion being determined of the total value of all the stocks and all the bonds of each corporation (except Farmers' Grain & Shipping Company, wholly in North Dakota) (Tr. pp. 7, 10, 12, 13, 14).

If the act be construed as laying on railways a tax in proportion to the local business within the state compared with the entire business, the bill shows that the tax would be very small compared with that in fact assessed. The assessment is clearly invalid on that construction of the act.

If the act be construed as assessing that proportion of the entire stock and bond issues, which the *mileage* within the state bears to the total mileage (the interpretation acted on by appellants), the act and the assessment are asserted to be invalid as a taxation of property beyond the jurisdiction of the state, and also a taxation of commerce among the states and with foreign nations.

It is also asserted that because of the federal control and operation of the railways by the Director General, the railway corporations were not "carrying on or doing business" in the state, and that the assessment is completely invalid on that ground (Tr. p. 6).

The Director General, having agreed (and also being bound by the federal control act) either to pay out of the revenues derived from railway operation during federal control, or to save the railway corporations harmless from, all taxes lawfully assessed under federal or any other govern-

mental authority, stands with respect to the railway companies as their guarantor against these taxes, if valid, and consequently is a proper plaintiff and entitled to raise any objection which the corporations could raise against the tax.

I.

The Remedy in Equity.

Jurisdiction in equity is asserted upon the following grounds:

(1) Whether the railway corporations might join in one suit need not be considered. Clearly the Director General, being in possession and operating the property of each of them, and being under the same obligation of indemnity to each, and having the same objections to urge against the assessment of each, and the same state officers being proper and necessary defendants with respect to the assessment against each, the Director General may include all the assessments in one suit. In this respect there is an avoidance of multiplicity of litigation, avoidance at least of five or six suits by or against as many railway companies.

(2) The tax is made by the act a first lien on all property within the state of each assessed railway corporation, taking precedence over all other demands and judgments, including apparently priority over mortgage and other similar liens. This is a ground of equity jurisdiction. *The Ohio Tax Cases*, 232 U. S. 576.

Shaffer v. Carr
Sup. Ct. Mem
1. 1920

(3) Ten per cent penalty immediately accrues about December 3, and thereafter one per cent for each month while the tax remains unpaid. The act directs proceedings to be taken by the Attorney General to collect the tax and penalties, by sale of the corporate properties or otherwise. This brings the case within those in which payment of the tax would not be voluntary and would be held made under duress. *Atchison, Topeka & Santa Fe Railroad v. O'Connor*, 223 U. S. 280; *Garr, Scott & Co. v. Shannon*, 223 U. S. 468, 471.

But the act requires that all moneys collected under its provisions shall be paid into the state treasury, to be used for defraying the general expenses of the state government. It is thought there is no statute of North Dakota giving the right to sue the state to recover taxes illegally exacted; and a tax payer's remedy against the receiving officer personally is certainly inadequate, for he is faced with the uncertainty of making collection. This was held to give equity jurisdiction in *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20.

It is shown by *Union Pac. R. R. Co. v. Weld Co.*, 247 U. S. 282, and by *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, cited and approved in *Greene v. Louisville & Interurban Railroad Co.*, 244 U. S. p. 519, that in order for payment under duress and suit to recover back to be adequate, there must be a clear right under the state law to recover from the governmental authority imposing and receiving the tax. See also *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. p. 531; *Johnson, Treasurer, v. Wells, Fargo & Co.*, 239 U. S. 234.

(4) The secretary of state after ninety days delinquency is required to cancel registration of the corporations, thus suspending their privileges under the laws of North Dakota to do business, until the tax is paid with penalties. This feature gives equity jurisdiction. *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146.

The Attorney General refers in the Court below to Sec. 8175 Compiled Laws North Dakota 1913, as affording a complete and adequate remedy at law. The section reads:

> "An action respecting the title to property, or arising upon contract may be brought in the district court against the state the same as against a private person. When such actions are not of a local nature they shall be brought in the county of Burleigh. The plaintiff at the time of commencing such action shall file an undertaking with sufficient surety to be approved by the clerk of court to the

effect that he will pay any judgment for costs that may be rendered against him."

A much broader provision is found in the laws of South Dakota, and we have searched in vain the reports of the courts of both Dakotas for any decision or precedent, indicating that actions against the state to recover illegal taxes once paid may be maintained as "arising upon contract" within this section. A number of actions against the state have been brought based on various express contracts. The section contains no mention of actions on *implied* contract or any general words which might be held to include all actions except those sounding in tort.

Such a statute being passed in derogation of the ordinary right of a state to be exempt from suit, cannot be enlarged by doubtful implications; and the plaintiffs are entitled to sue in equity unless the state statute *very plainly* provides an adequate remedy at law.

Light is thrown on the interpretation of this statute when we consider the acts of Congress authorizing suit against the United States and the decisions thereon. The Congressional act is Sec. 145 of the Judicial Code, formerly the Tucker act of March 3, 1887. This authorizes suit in the court of claims on all claims (except for pensions) founded upon (1) the Constitution of the United States or any law of Congress, (2) any regulation of an executive department, (3) any contract, express or implied, with the government of the United States, or (4) for damages,

liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.

Without going over the decisions and tracing the development of the doctrine now held, it is sufficient to say, as Mr. Justice Holmes said in *United States v. Emery*, 237 U. S. 28, 32, that the federal courts entertain jurisdiction of suits to recover taxes illegally exacted because they are "founded upon" an act of Congress and not because of any implied contract. Indeed the decisions show that there is no implied contract, where the government either takes property under a claim of title, or exacts payment of taxes asserting them to be legal. *United States v. Emery, supra; Basso v. United States*, 239 U. S. 602; *United States v. Lynah*, 188 U. S. 445; *Dooley v. United States*, 182 U. S. 222.

In *United States v. Savings Bank*, 104 U. S. 728, and *United States v. Kaufman*, 96 U. S. 567, the commissioner of internal revenue, as authorized by an act of Congress, had first allowed the claim sued for. Because it was so allowed it was held to be a claim on contract, and the court drew sharply the distinction between a claim so allowed and one which the commissioner had denied, holding that the remedy in the latter case was a personal one against the collector; that the government might be sued on an allowed claim, but

not on one disallowed. These cases are therefore distinct authority that a bare action to recover taxes paid under protest is not one based on contract, express or implied; *a fortiori* it does not fall under the North Dakota statute which says nothing about implied contracts.

The equity jurisdiction was sustained in *Johnson, Treasurer, v. Wells Fargo & Co.*, 239 U. S. 234, and by the Circuit Court of Appeals in the same case, 214 Fed. 180, notwithstanding a statute of South Dakota which gave a much better remedy than the statute in question. Section 2109 South Dakota Revised Code 1919 reads:

> "It shall be competent for any person deeming himself aggrieved by the refusal of the state auditor to allow any just claim against the state, to commence an action against the state by filing with the clerk of the supreme court a complaint setting forth fully and particularly the nature of the claim. He shall at the same time file an undertaking in the penal sum of five hundred dollars, with two or more sureties, to be approved by the state treasurer, to the effect that he will indemnify the state against all costs that may accrue in such action, and pay to the clerk of said court all costs in case he shall fail to prosecute his action, or to obtain a judgment against the state; and thereupon the action shall be placed upon the calendar of said court."

Section 2112 of the same Code reads:

> "No execution shall issue against the state on any judgment, but whenever final judgment against the state shall have been obtained in any such action the clerk of the supreme court shall make and furnish to the state auditor a duly certified transcript of such judgment,

and the auditor shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury."

II.

The Merits.

(1) The jurisdiction being properly invoked on constitutional grounds, the court will determine all questions involved, though purely of state law. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508. Such a question is whether federally controlled and operated railways were carrying on or doing business so as to come under the act.

The act reads, "a special excise tax with respect to the carrying on or doing business," like the act of Congress imposing a capital stock tax or special excise tax on corporations (See Title X of the Revenue Act of Congress 1918, and Sec. 407 of the Revenue Act of Congress of 1916). Before North Dakota passed its act the act of Congress had been construed in *Zonne v. Minneapolis Syndicate*, 220 U. S. 187 and *McCoach, Collector, v. Minehill Railroad*, 228 U. S. 295. In the latter case a railway company, having leased its road, collecting the rental and some income from securities, was held not to be "carrying on or doing business."

Also the plaintiff railway companies and other companies whose railway business and property

were taken over by the government, receiving compensation for such use in the nature of rental, have been held by the Treasury Department to be in the class of the Minehill Railroad and not subject to the federal excise tax. See Art. 21 Capital Stock Tax Regulations, U. S. Treasury Department.

We submit that the interpretation of the act of Congress should determine the interpretation of this act.

(2) The Constitution of North Dakota, Article 11, Sec. 179, provides for taxation at full value of "the franchise, roadway, roadbed, rails and rolling stock" of all railroads. Under this the State Board assessed for 1918 the full value of each mile of property of each plaintiff corporation. As shown in Public Document 28, "Proceedings of the State Board of Equalization of North Dakota 1918," the Board valued for each mile separately the following items: "Franchise per mile," "Roadway per mile," "Roadbed per mile," "Rails per mile," "Rolling stock per mile." They fixed values so large as to be disputed by the corporations. It is not intended to try here this valuation, but only to show that both franchises and property of the railways in North Dakota are taxed on the basis of full value under another law, and that the tax in question cannot be sustained as a property tax, *Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298. It stands or falls as an excise or privilege tax on

the right to carry on business, and as such cannot stand, unless it taxes the privilege *only* of carrying on business local to the state.

(3) It is too well settled now to admit of debate that a tax which professes to be on a privilege may be, by reason of the mode of its assessment, in substance a tax on property without the state and therefore a trespass on fields which the state constitutionally may not enter; that a tax which calls itself a tax on the privilege of doing business within the state must be regarded as a tax on property outside the state if its amount is fixed by the value of such property. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146; *Pullman Co. v. Kansas*, 216 U. S. 56; *Atchison, T. & S. F. Ry. v. O'Connor*, 223 U S. 280; *Looney v. Crane Co.*, 245 U. S. 178; *International Paper Co. v. Massachusetts*, 246 U. S. 135; *Locomobile Co. of America v. Massachusetts*, 246 U. S. 146.

The Tax Commissioner, construing the law as so requiring, first ascertained the value of all the property of each railway corporation by determining the total value of all its stocks and bonds and then based his assessment on the ratio of each company's railroad mileage in North Dakota to its total mileage.

Not only did this assessment include all the *railway* property of each company, but as well its property which is no part of its system of trans-

portation. This is clear because the assessment is based on the value of the total stock and bonds, and these securities represent the business world's estimate of the total value of all the property and franchise of each company.

As said by the court through Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S., page 605:

> "When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In the case of the Northern Pacific this property included over $50,000,000.00 worth of lands, no substantial part of which was in North Dakota; securities valued on the company's books at over $180,000,000.00, representing properties entirely outside of North Dakota; and by the inclusion of all the bond obligations of the company the assessment gathered in over $117,000,000.00 standing for nothing in North Dakota. Facts similar to these are shown by the bill in the case of all the other corporate plaintiffs except the Farmers' Grain & Shipping Company and the Montana Eastern.

The bill also shows that the railways of the corporate plaintiffs have no uniformity in character, cost, or value, when North Dakota is compared with other states. The physical condi-

tions in North Dakota are shown to be different from those of other states, North Dakota being a state of plains and differing widely from the other states in physical characteristics. Also it appears that there are no considerable railway terminals in North Dakota and that the principal and enormously valuable terminals of the corporate plaintiffs are in other states; also that the proportion of branch line to main line is unusually high in North Dakota. The facts shown by all the corporate plaintiffs (except Farmers' Grain & Shipping Company and Montana Eastern) are similar in this respect.

Since the act of Congress was passed in 1913 for valuation of railways, it has become more and more apparent that valuation might come to be used as a basis of rates. Every carrier has had an obvious and growing interest in securing a valuation at least as high as facts will warrant, and no carrier has been tempted to undervalue its property. It appears by the bill that the Northern Pacific, after having expended many years of effort and several hundred thousand dollars of money, is able to state with certainty that a fair estimate of the cost of reproducing its property in North Dakota, new without depreciation, does not exceed $81,000,000.00; the Great Northern states that its cost of reproduction new in North Dakota is about $94,000,000.00; the Soo contends that its value in North Dakota does not exceed $41,000,000.00. Any estimate of cost of reproduction new is certainly subject to reduction

for depreciation, and it is quite uncertain how much addition can be allowed for going concern or other intangible elements of value. When it is considered that the assessment complained of valued the Northern Pacific in North Dakota at over $110,000,000.00, the Great Northern at over $99,000,000.00, and the Soo at over $51,000,000.00, it becomes apparent that the valuation includes much property in other states.

This case, we submit, is ruled by *Western Union Telegraph Company v. Kansas, and Pullman Company v. Kansas,* in 216 U. S. and the decisions above cited following them; indeed this is a much stronger case. In the Kansas cases the statute laid a tax of one-tenth of one per cent on authorized capital stock, with graduated reduction of the rate beyond the first $100,000.00 of stock. Here the state levies an indeterminate per cent, based on comparative railroad mileage, of all the capital stock and all the bonded obligations. The judgments in the Kansas cases, notwithstanding the dissents, have since become for all practical purposes the unanimous judgment of the court, and Mr. Justice Holmes, the leader of the dissent, has in subsequent opinions quoted these decisions with approval and followed them.

As Mr. Justice White and Mr. Justice Harlan both pointed out in the Kansas cases, the companies taxed had been doing local and interstate business in Kansas for a long time; they came in as the result of implied or tacit invitation of the state; they had expended large sums of

money in the state and their investments were still there, depending for profitableness on the right to use the property for both interstate and local business. The fact cannot be ignored that in general the carrying on of both businesses is necessary to the profitable use of the investment. It is therefore no doubt impracticable for a company to withdraw from local business, and in North Dakota this is doubtless legally impossible in case of railroads. See *Pullman Company v. Adams*, 189 U. S. 420; *Allen v. Pullman Palace Car Co.*, 191 U. S. 171, which hold that a tax on the right to do local business of a carrier engaged in both local and interstate commerce may be a burden on interstate commerce unless the carrier has the privilege to abandon local business. Sec. 142 Constitution of North Dakota, declares all railways public highways and all railway companies common carriers subject to legislative control, and the legislature is given power to regulate and control the charges for transportation from one point to another in the state. We refer to sections 4635, 4710 and 4715 of the North Dakota Civil Code, and many other similar statutes might be cited. By Sec. 4635 it is required that every railroad corporation shall run trains and furnish sufficient accommodation for the transportation of all passengers and property offered for transportation on due payment of tolls, freight or fare therefor. By Sec. 4710 it is made the duty of every railroad corporation on reasonable notice to furnish cars

and to receive and transport freight with all reasonable despatch, and to provide and keep suitable facilities for receiving and handling the same, and also to receive and transport empty and loaded cars from other roads. Sec. 4715 requires every common carrier operating a railway without unreasonable delay to furnish, start and run cars for the transportation of persons and property within a reasonable time after the same is offered for transportation at any of its stations and at the junctions of other railroads, and at such stopping places as may be established, and it is required to take, receive, transport and discharge such passengers and property.

The case of *Atchison, T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280, where the opinion was by Mr. Justice Holmes, shows that the Kansas cases have become definitely the judgment of the court, and a tax of two cents per thousand dollars on all the capital stock of a foreign corporation was held invalid, because the greater part of its property and business was outside the state of Colorado, and of the business done within Colorado a small proportion was local and the greater part commerce among the states.

The cases of *Kansas City, etc., Railway v. Stiles*, 242 U. S. 111, and *Kansas City, etc., Railway v. Kansas*, 240 U. S. 227, are cases of a license fee levied on domestic corporations for the privilege of being incorporated, and that they have in no wise affected the doctrine of the Kansas and Arkansas cases reported in 216 U. S. is made plain by

Looney v. Crane Co., 245 U. S. 178. There it was held that the court will regard the substance and not the shadow and will look into the rule for determining the tax, the amount of the imposition, and all other features of the state law, in order to ascertain whether the tax is really one so disproportionate to the local business in the state, as to make it apparent that it unduly burdens commerce among the states or taxes property beyond the taxing state's jurisdiction.

As Mr. Justice Holmes well said in *Galveston, etc., Railway Co. v. Texas*, 210 U. S. 217, we are to look for a practical rather than a logical or philosophical distinction, and neither the state courts or legislatures, by giving the tax a particular name or by the use of mere form of words, can take away the duty of the federal courts to consider its nature and effect; if it bears upon commerce among the states so as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.

So thoroughly settled has it become that such taxes as that in question are invalid, that the court in *International Paper Company v. Massachusetts*, 246 U. S. 135, 141, codified the rules on the subject, of which codification the 5th rule is as follows:

> "A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local busi-

> ness therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located."

(4) Under the special facts shown in the bill, the taxing of a track mileage proportion of the total value of all the carrier's property of every kind whatsoever and wherever situate, demonstrates that the tax is laid on property beyond the jurisdiction of the taxing state. This principle was established by *Fargo v. Hart*, 193 U. S. 490, and is more strongly applicable here than it was there. *Fargo v. Hart* has been repeatedly followed and reaffirmed. Its effect is not weakened by any subsequent decision.

The cases of *Pittsburgh, etc., Railway Co. v. Backus*, 154 U. S. 421, and *Western Union Telegraph Company v. Taggart*, 163 U. S. 1, recognize and affirm the rule afterwards announced in *Fargo v. Hart*. These cases arose under the statute of Indiana for the taxation of railways and telegraphs. In the Backus case, pp. 430-432, Mr. Justice Brewer, in answering the contention that the state had taxed property beyond its jurisdiction, took pains to show that the statute of Indiana did not require the division of the gross value upon a mileage basis, but only required that the total

value should be considered by the state board. He then said that while ordinarily a railroad consisting of a single continuous line may be assumed to be of fairly uniform value, this may be negatived, as by showing terminal facilities of great value destroying the uniformity. It was not made to appear in that case that the state board had applied the mileage rule, or had failed to give due weight and effect to all the facts making against the applicability of that rule. The same remarks are applicable to *Western Union v. Taggart;* see 163 U. S., pp. 25-28.

In *Oklahoma v. Wells Fargo & Co.,* 223 U. S. 298, the court considered a tax on gross receipts, or on such part of gross receipts as the business within the state bore to the whole business. The plaintiff's receipts being largely from commerce among the states, and also in part from investments in lands and bonds outside Oklahoma, the court by Mr. Justice Holmes said it was evident the tax was bad on the authority of *Fargo v. Hart.* The court said the principle of that case applied to a property tax measuring the total property by total gross receipts increased by special outside sources of income and taking a proportion of this total fixed by the ratio of business within the state and that outside; and that if not a property tax the tax there considered was equally bad, for it was plain that the gross receipts from all sources could not be used as a means for estimating the going value of the property within the state.

The cases of *Louisville & Nashville Railroad v. Greene,* 244 U. S. 522, and *Illinois Central v. Greene,* 244 U. S. 555, involved an act of Kentucky imposing a tax on franchises. In determining the value of the franchise, the value of all the tangible property of the corporation was first deducted. The law did not base the franchise tax on a mileage ratio, but provided simply that this ratio might be considered. In the case of *Louisville & Nashville* (p. 548) the assessment was shown not necessarily to result in including in the value of the Kentucky franchise either tangible or intangible property not within the state; the court saying that in levying a property tax on property partly within and partly without the state organically related, mileage might be taken into consideration and given its proper weight, citing with approval *Fargo v. Hart,* and certainly not intending to weaken that decision. In the *Louisville & Nashville* case no point was made against the fairness of mileage apportionment (and it will not be doubted that there are cases where it would be fair), while in the *Illinois Central* case no objection had been made originally to a mileage apportionment, and an objection interposed at a late stage of the case was held to come too late.

Fargo v. Hart was approved and followed in *Union Tank Line Co. v. Wright,* 249 U. S. 275, 286, and was held to condemn an assessment ostensibly apportioned to mileage where property

without the state and unnecessary to the transportation business had been included; and it was said that under no formula can a state tax things wholly beyond its jurisdiction.

CHARLES W. BUNN,
BURTON HANSON,
E. C. LINDLEY,
A. H. BRIGHT.
On behalf of Corporate Appellees.

H. B. No. 47.

AN ACT

To provide for defraying the general expenses of the State government, by imposing a tax on the shares of stock and the bond issues of corporations organized or doing business in the State, and repealing all Acts and parts of Acts in conflict herewith.

Be It Enacted by the Legislative Assembly of the State of North Dakota:

Section 1. On and after January first, 1919, taxes shall be and hereby are imposed annually as follows:

(1) Every corporation, joint-stock company or association, now or hereafter organized in the State for profit and having a capital stock represented by shares or issuing bonds, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint stock company, or association during the previous calendar year, equivalent to 50 cents for each $1000 of the fair value of its capital stock or bonds issued; and in estimating the value of capital stock, the surplus and undivided profits of such corporation, joint-stock company or association shall be included. The amount of such annual tax shall in all cases be computed on the basis

of the fair average value of the capital stock and bonds for the preceding year; provided, that for the purpose of this tax an exemption of $10,000.00 shall be allowed from the capital stock of any such corporation, joint-stock company or association.

(2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each $1000.00 of the capital actually invested in the transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or

freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calender year; provided, that for the purpose of this tax an exemption of $10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

Section 2. There shall not be taxed under this Act any—

(1) Labor, agricultural, or horticultural organization;

(2) Mutual savings bank not having a capital stock represented by shares;

(3) Fraternal beneficiary society, order or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefit—to the members of such society, order, or association, or other dependents;

(4) Domestic insurance company or building or loan association or co-operative bank, organized and operated for mutual purposes and without profit;

(5) Cemetery company owned and operated exclusively for the benefit of its members;

(6) Corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

(7) Business League, Chamber of Commerce, or Board of Trade, not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

(8) Civic league or organization not organized for profit, but operated exclusively for the promotion of general welfare;

(9) Club organized and operated for pleasure, recreation or other non-profitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

(10) Farmers' or other mutual hail, cyclone, crop or fire insurance company, mutual or co-operative telephone or like organization of a purely local character, the income of which consists wholly of assessments, dues or fees collected from members for the sole purpose of meeting its expenses;

(11) Farmers' mutual warehouse, elevator, creamery, packing or canning company or like organization; farmers' or like association organ-

ized and operated as a sales agent for the purpose of marketing the products of its members, or any other organization having a membership and not conducted for profit, but for the service of its members or the public;

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this Act;

(13) Federal Land Bank or National Farm Loan Association, as provided in Section 26 of the Act of Congress approved July 17th, 1916, entitled An Act to provide capital for agricultural developments, to create standard forms of investment based upon farm mortgages, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories and financial agents for the United States, and for other purposes;

(14) Corporation owned and operated by the State.

Section 3. Every corporation, joint-stock company or association subject to the tax herein imposed, shall, on or before the first day of August, 1919, and on or before the first day of March each year thereafter, make a report to the State Tax Commissioner, which shall include the following:

(1) The name of the corporation, joint-stock company or association, the place where incor-

porated, the date of incorporation and the purpose for which incorporated;

(2) The names and addresses of the President or Vice-President, Secretary, Treasurer and the General Manager or chief representative in the State, or, if no representative in the state, then the General Manager or chief representative elsewhere;

(3) The principal place of business in the state, or if no place of business in the state the chief place of business outside of the state;

(4) The number of shares of stock issued, the number subscribed and paid up and the par and actual or market value of the same, and all issues of stock during the previous calendar year;

(5) All bond issues previous to the date of making return, and all bond issues during the previous calendar year.

Such return shall be sworn to by the president, Vice President or other principal officer, and by the Treasurer or Assistant Treasurer, and may be made to the Commissioner, or to his authorized agent in the district in which is located the principal office of the corporation, joint-stock company or association. Such report shall be made in the form and manner prescribed by the Commissioner, who shall furnish to each corporation, joint-stock company or association coming within the provisions of this Act all necessary forms and blanks upon which to make the return; provided, that such blanks and forms shall be insofar as

practicable, similar to those prescribed by Congress for making returns to the United States Commissioner of Internal Revenue for the purposes of the federal tax on corporations, joint stock companies and associations; provided, further, that every such corporation, joint-stock company or association shall file with the State Tax Commissioner a duplicate of the return made by it to the United States Commissioner of Internal Revenue, and shall in addition furnish to the Commissioner all other information required by this Act, and all information reasonably necessary to enable the Commissioner to carry out its provisions.

Section 4. The tax herein imposed shall be assessed by the State Tax Commissioner, on or before the fifteenth day of August, 1919, and on or before the first day of August of each year thereafter, who shall certify the amount of such tax in each case to the State Auditor; and within twenty days thereafter the Auditor shall make his draft upon such corporation, joint-stock company or association for the amount of the tax due as certified, and shall present the same to the State Treasurer for collection. Within twenty days thereafter the State Treasurer shall make demand for the payment of such warrant; and if any such corporation, joint-stock company or association shall fail to pay the same within thirty days after such demand, a penalty of 10% thereof shall immediately accrue, and thereafter 1% for each month after the tax becomes delinquent, while the

same remains unpaid. Such tax being delinquent and unpaid shall be a first lien upon all and singular the property, estates and effects of such corporation, joint-stock company or association within the State, and shall take precedence over all other demands and judgments against the same; and the certificate of the Tax Commissioner that such tax is due, and the unpaid draft of the State Auditor issued in pursuance thereof, shall be sufficient warrant for the Attorney General to institute proceedings for the collection of said tax and penalty by the sale of said property or otherwise; and the Attorney General shall enter such proceedings on the certification of the State Auditor that such tax is due and unpaid 30 days after demand for payment has been made as herein provided. Such penalty shall be added to the tax and shall be demanded and paid in the same manner as provided for the tax itself. When any such tax shall have been delinquent for ninety days it shall, in the case of a North Dakota corporation, constitute sufficient ground for the annullment of the existence of such corporation in an action instituted by the Attorney General for that purpose, and in the case of a foreign corporation, on the certificate of the Tax Commissioner that such tax has been due for ninety days and remains unpaid, the Secretary of the State shall cancel the registration of such corporation and notify it that all of its privileges under the laws of the State are suspended until such tax, together with all penalties provided in this Act, has been paid.

Section 5. All moneys collected under the provisions of this Act shall be paid into the State Treasury to be used for the defraying of the general expenses of the State Government.

Section 6. All administrative, special and general provisions of law, including the general tax laws of the State, insofar as consistent with the provisions of this Act, are hereby extended and made applicable to all the provisions herein contained.

Section 7. If any clause, sentence, paragraph or part of this Act, shall for any reason be declared invalid by a court of competent jurisdiction, such judgment shall not impair or invalidate any other clause, sentence, paragraph or part thereof, but any such part shall be of full effect and validity, as if no such decision had been rendered.

Section 8. All Acts and parts of Acts in conflict with this Act are hereby repealed.

Received by the Governor March 1, 1919.

Approved March 7, 1919.

Filed March 8th, 1919.

WALLACE ET AL. *v.* HINES, DIRECTOR GENERAL OF RAILROADS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 683. Argued April 21, 1920.—Decided May 3, 1920.

In the absence of an adequate remedy at law plainly allowed against the State, equity has jurisdiction to restrain state officials from enforcing an illegal tax, the effect of which if not paid would be to cloud plaintiff's title and subject him to pecuniary penalties. P. 67.

Held, that the law of North Dakota permitting actions respecting title to property or arising upon contract to be brought against the State as against a private person does not clearly allow such an adequate remedy, since an action to recover money wrongfully extorted is a case in contract only in an artificial sense. *Id.*

The method of taxing an interstate railroad company by assessing the value of its property within the State at that proportion of the total value of its stocks and bonds that the main track mileage within the State bears to the main track mileage of the entire line, is indefensible when it is shown that the cost of construction per mile was much less within than without the taxing State, and that the large and valuable terminals are elsewhere. P. 68.

No property of such an interstate railroad situate beyond the State can be taken into account in taxation unless it can be seen in some plain, intelligible way that it adds to the value of the road and of the rights exercised, within the taxing State. P. 69.

Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant or other property elsewhere, adding to the riches of the corporation but not affecting the road in the taxing State, can afford no ground for increasing the tax there, whatever the tax may be,—on property or an excise on doing business. P. 70.

North Dakota law of March 7, 1919, c. 222, as administered, *held* an unwarrantable interference with interstate commerce and a taking of property without due process of law. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. F. E. Packard, Assistant Attorney General of the State of North Dakota, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, was on the brief, for appellants.

Mr. E. Marvin Underwood, with whom *The Solicitor General*, *Mr. D. F. Lyons*, *Mr. M. L. Countryman*, *Mr. H. H. Field*, *Mr. H. B. Dike* and *Mr. Alexander Koplin* were on the brief, for the Director General of Railroads, appellee.

Mr. Charles W. Bunn, with whom *Mr. Burton Hanson*, *Mr. E. C. Lindley* and *Mr. A. H. Bright* were on the brief, for the railway companies, appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from an order of three judges restraining the defendants, the appellants, from taking steps to enforce taxes imposed by an Act of North Dakota, approved March 7, 1919, (c. 222,) until the further order of the Court. The plaintiff railroads are corporations of other States with lines extending into North Dakota. The defendants are the State Tax Commissioner, the State Treasurer, the State Auditor, the Attorney General and the Secretary of State for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the State and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State, to which the tax is to be paid. *Shaffer* v. *Carter*, 252 U. S. 37. *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 472. The only ground for supposing that there is such a remedy is a provision that "an action respecting the title to property, or arising upon contract may be brought in the district court against the

state the same as against a private person." Compiled Laws, N. Dak. 1913, § 8175. This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the State Court might say if an action at law were brought. *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282.

We quote the tax law in full.[1] It will be seen that it

[1] (2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other State, the United States or a foreign country, and engaged in business in the State during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the State by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000.00 of the capital actually invested in the transaction of business in the State; provided, that in the case of a corporation engaged in business partly within and partly without the State, investment within the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from such entire business within and without the State, business within the State shall be held to mean such proportion of the entire business within and without the State, as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of

purports to be a special excise tax upon doing business in the State. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the

this tax an exemption of $10,000.00 from the amount of capital invested in the State shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart*, 193 U. S. 490. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282.

The Attorney General of the State in his very candid argument suggested that if the mode adopted by the tax commissioner were open to objections the statute might be construed to give him an election as to the method of distribution, and that he should take gross earnings, or, if more easily ascertainable, the property or mileage basis of distribution. As we are dealing only with a preliminary injunction we confine our consideration to a general view of the mode actually followed, and upon that we are of opinion that the decree should be affirmed.

Decree affirmed.